FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT CRUZ MCLAIN,
Petitioner-Appellee,

v.

ARTHUR CALDERON, Warden,
Respondent-Appellant.

No. 95-99020
D.C. No.
CV-89-03061-JGD
OPINION

Appeal from the United States District Court
for the Central District of California
John G. Davies, District Judge, Presiding

Argued and Submitted
August 22, 1997—Pasadena, California

Filed January 26, 1998

Before: Warren J. Ferguson, Cynthia Holcomb Hall* and Alex Kozinski, Circuit Judges.

Opinion by Judge Kozinski; Concurrence by Judge Ferguson

SUMMARY

Criminal Law and Procedure/Jury Instructions

The court of appeals affirmed a judgment of the district court. The court held that a "Briggs" jury instruction that omits a statutory limitation on a governor's power to com-

*Judge Hall does not join in footnote 3 of the opinion.

mute a sentence of life without parole (LWOP) supports reversal of a death sentence.

The Supreme Court held in *California v. Ramos*, 463 U.S. 992 (1983), that in a capital case, a state trial court may use a "Briggs" instruction to inform a jury that the state's governor can commute an LWOP sentence to a lesser sentence, possibly including parole. In a California capital prosecution of a defendant with two prior felony convictions, the Governor may grant such a commutation only if four justices of the California Supreme Court so recommend.

Hamilton v. Vasquez, 17 F.3d 1149 (9th Cir. 1994), held that a California trial court violated *Ramos* by incorrectly suggesting to a jury that Hamilton could be paroled after serving only 17 years of a life sentence. The court also criticized the instruction because it diverted the jury's attention from mitigation evidence to commutation procedures.

Appellee Robert McLain had two prior felony convictions when he was charged in California state court with rape and murder. The trial court gave a Briggs instruction, but did not advise the jury that four justices had to recommend executive commutation for the governor to grant it. After exhausting his state-court remedies, McLain sought federal habeas corpus relief.

The district court set aside McLain's death sentence on the ground that the trial court erroneously excluded expert testimony regarding his future behavior. The State appealed.

[1] This case was materially indistinguishable from *Hamilton*. McLain had two prior felonies and the jury was given essentially the same Briggs instruction. The judge did not advise the jury that the governor could exercise his clemency powers only on the recommendation of four justices. This made McLain's instruction substantially more misleading than Hamilton's because the jury would no doubt have

believed that the governor acting alone could commute McLain's sentence. Moreover, the instruction improperly focused the jury's attention on commutation procedures rather than on the question of mitigation. Under *Hamilton*'s authority, the district court's judgment had to be affirmed.

Judge Ferguson concurred separately, noting that McLain was also entitled to habeas corpus relief on two grounds not addressed by the lead opinion.

COUNSEL

Keith H. Borjon, Deputy Attorney General, Los Angeles, California, for the respondent-appellant.

Robin M. Shapiro, Philadelphia, Pennsylvania, for the petitioner-appellee.

OPINION

KOZINSKI, Circuit Judge.

I

Robert Cruz McLain has a history of raping and sometimes killing young women. He was convicted and sentenced to death for one of those killings; the California Supreme Court affirmed. *People* v. *McLain,* 46 Cal. 3d 97 (1988), *cert. denied,* 489 U.S. 1072 (1989). Having exhausted his state court remedies, McLain filed a federal habeas petition raising 28 claims for relief.[1] The district court rejected 27 of those

[1]McLain's case is not covered by the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, Title I, 110 Stat. 1214 (Apr. 24, 1996), *amending* 28 U.S.C. §§ 2244 and 2253-55 *and further codified at* 2261-66. *Robbins* v. *Smith,* 125 F.3d 831, 833 (9th Cir. 1997); *see Lindh* v. *Murphy,* 117 S. Ct. 2059, 2067-68 (1997).

claims, but set aside McLain's death sentence after finding that the exclusion of expert psychiatric testimony predicting his future behavior violated *Skipper* v. *South Carolina*, 476 U.S. 1 (1986).

The state appeals. McLain counters by defending the district court's *Skipper* ruling, and also by arguing that the death sentence was invalid on one of two other grounds: that his trial counsel was ineffective in failing to present sufficient mitigating evidence to the jury and that the jury instructions violated *Hamilton* v. *Vasquez*, 17 F.3d 1149 (9th Cir. 1994).[2] Because we find McLain's *Hamilton* argument persuasive, we need not consider the other issues presented.[3]

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[2]In truth, McLain asks us to consider all of his 25 remaining claims of error by purporting to incorporate his habeas petition and trial briefs into his brief before us. Appellee Br. pp. 3-4. However, "[a]n issue not discussed in a brief, although mentioned in the Statement of Issues, is deemed to be waived." *Resorts Int'l* v. *Lowenschuss (In re Lowenschuss)*, 67 F.3d 1394, 1402 (9th Cir. 1995), *cert. denied* 116 S. Ct. 2497 (1996). Space was not the problem. McLain had 75 pages but used only 31.

[3]The state argues that we may not consider *Hamilton* because McLain did not file a timely cross-appeal. The Deputy Attorney General who handled this case is apparently unaware of the long-standing rule that we may affirm the judgment below on any basis supported by the record. *See, e.g., Helvering* v. *Gowran*, 302 U.S. 238, 245 (1937) ("[I]f the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason."); *United States* v. *Fonseca-Martinez*, 36 F.3d 62, 65 (9th Cir. 1994) ("The court of appeals may affirm so long as there exists any ground, fairly supported in the record, that supports the district court's ruling.").

We are troubled by the frequency with which the California Attorney General's office manifests unfamiliarity with such elementary principles of federal procedure. A prime example of this can be found by listening to the oral argument tape in this case, available from the clerk of our court. Given the number of cases, including death cases, the Attorney General of California litigates in the courts of our circuit, this is decidedly unhelpful.

II

In *California* v. *Ramos*, 463 U.S. 992 (1983), the Supreme court approved the use of what's known as a Briggs instruction.[4] This instruction informs a jury charged with choosing between imposing a death sentence and life without parole (LWOP) of the governor's power to commute LWOP to a lesser sentence, possibly including parole. The Court found that "[t]he Briggs Instruction thus corrects a misconception and supplies the jury with accurate information for its deliberation in selecting an appropriate sentence." *Id.* at 1009.

Ramos dealt with the Briggs instruction in a case where the governor did, indeed, have the unilateral power to commute the sentence. The governor of California, however, does not have such power in all cases. Where the defendant has two prior felonies, the governor may commute the sentence only upon the written recommendation of four justices of the California Supreme Court. *See* Cal. Penal Code §§ 4802, 4813, 4852. In *Hamilton* we considered a petitioner in that situation. The jury there was given the standard Briggs instruction, followed by a lengthy modification.[5] The modification (cor-

[4]The plain-vanilla Briggs Instruction reads:

> You are instructed that under the State Constitution, a Governor is empowered to grant a reprieve, pardon, or commutation of a sentence following conviction of a crime.
>
> Under this power a Governor may in the future commute or modify a sentence of life imprisonment without possibility of parole to a lesser sentence that would include the possibility of parole.

Ramos, 463 U.S. at 995-96.

It was incorporated into the California Penal Code as a result of a 1978 voter initiative. *See id.* at 995 n.4. However, the California Supreme Court held that the instruction violated the California Constitution, *People* v. *Ramos*, 37 Cal. 3d 136, 159 (1984), and it is no longer given. Both Hamilton and McLain were sentenced before the California decision.

[5]The instruction in *Hamilton* read as follows:

rectly) informed the jury about the limitation on the Governor's clemency authority, but then (incorrectly) went on to suggest that the defendant might in fact be put on probation after serving only about 17 years of a life sentence. According to *Hamilton,* this violated *Ramos*'s holding that the jury must be given accurate information as to the likelihood that the defendant will be released from incarceration if he were sentenced to LWOP. 17 F.3d at 1162. In *Hamilton* we also criti-

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> You are instructed that under the state constitution, a governor is empowered to grant a reprieve, pardon or commutation after sentence following conviction of a crime. Under this power a governor may in the future commute or modify a sentence of life imprisonment without possibility of parole to a lesser sentence that would include the possibility of parole.
>
> This is subject to the requirement that, in the case of any person twice convicted of a felony, a commutation or modification may not be granted absent the written recommendation of at least four justices of the California Supreme Court. Further, a life sentence requires a minimum incarceration of 25 years less one-third off for good time credits before parole may be considered by the proper authorities. You are now instructed, however, that the matter of a possible commutation or modification of sentence is not to be considered by you in determining the punishment for Mr. Hamilton. You must not speculate as to whether such commutation or modification would ever occur. It is not your function to decide now whether this man will be suitable for parole at some future date. So far as you are concerned, you are to decide only whether this man shall suffer the death penalty or whether he shall be permitted to remain alive. If upon consideration of the evidence you believe that life imprisonment without possibility of parole is the proper sentence, you must assume that the Governor, the Supreme Court, and those officials charged with the operation of our parole system will perform their duty in a correct and responsible manner, and that Mr. Hamilton will not be paroled unless he can safely be released into society. It would be a violation of your duty as jurors if you were to fix the penalty at death because of a doubt that the Governor and other officials will properly carry out their responsibilities.

17 F.3d at 1160, 1161-62.

cized the instruction on the ground that it "diverted [the jury] from [its] task by having its attention focused on commutation procedures rather than the significant mitigating evidence defense counsel introduced at the penalty phase." *Id.* at 1162-63. We therefore vacated the death sentence.

[1] Our case is materially indistinguishable from *Hamilton*; the state has elsewhere admitted as much.[6] McLain, like Hamilton, had two prior felonies. And the jury in Mclain's case was given essentially the same modified Briggs instruction.[7]

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[6]In its certiorari petition in *Hamilton*, the state, referring *inter alia* to McLain's case, stated as follows: "While California no longer requires instruction of the jury with the penalty phase instruction . . . there remain several capital cases, which are still pending federal habeas review, wherein the instruction to the jury was identical to the instruction given in this case."

[7]The instruction reads as follows:

> You are instructed that under the State Constitution a governor is empowered to grant a reprieve, pardon, or commutation after sentence following conviction of a crime. Under this power, a governor may in the future commute or modify a sentence without — of life without possibility of parole to a lesser sentence, which would include the possibility of parole.
>
> You are further instructed that such power by a governor to commute or modify a sentence is not to be considered by you in determining whether the defendant should be sentenced to death or life imprisonment without the possibility of parole.
>
> You may not speculate as to if or when a commutation or modification would or would not be granted to the defendant. It's not your function to decide now whether the defendant will receive such a commutation or modification at some future date. So as far as you are concerned, you are to decide only whether the defendant should suffer the death penalty or should be permitted to remain alive under the sentence of life imprisonment without the possibility of parole.
>
> If upon consideration of the evidence and instructions you conclude that life imprisonment without the possibility of parole is the proper sentence, you must assume that the governor will perform his duty in a correct and responsible manner and will not

There are only two difference between the instruction given in our case and that in *Hamilton*: First, the judge here did not advise the jury that the governor could exercise his clemency powers only upon the recommendation of four justices. This makes McLain's instruction substantially more misleading than Hamilton's because the jury here would no doubt have believed that the governor, acting alone, could commute McLain's sentence. Second, the instruction here did not refer to the possibility that defendant would be released after serving only 17 or so years. This avoided one of the problems with the instruction in *Hamilton*, but did nothing to negate the impression that the governor, acting alone, could reduce any LWOP sentence the jury might impose, and thus that McLain might someday be released unless he were given the death penalty. Moreover, the instruction here, like that in *Hamilton*, improperly focused the jury's attention on commutation procedures rather than on the question of mitigation. While we might not decide this question the same way were we considering it in the first instance, *Hamilton* is binding on us as the law of the circuit. Under its authority we must affirm the district court's judgment setting aside McLain's death sentence.

AFFIRMED.

FERGUSON, Circuit Judge, concurring.

I concur in affirming the district court's grant of habeas corpus relief to Robert Cruz McLain on the basis of *Hamilton*

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commute this defendant's sentence unless convinced that he should be eligible for parole and can be safely released into society, in a correct and responsible manner.

It would be a violation of your duty as jurors if you were to fix the penalty at death because of a doubt that the governor will properly carry out his responsibilities.

RT Augmentation 120-21.

error. I write separately because two additional bases also support the grant of habeas relief. The exclusion of testimony regarding McLain's ability to adapt to life in prison violates *Skipper v. South Carolina*, 476 U.S. 1 (1986). The California Supreme Court and the district court were correct in finding *Skipper* error. *People v. McLain*, 757 P.2d 569, 575 (Cal. 1988); *McLain v. Calderon*, 1995 WL 769176, *71 (C.D. Cal. 1995). In addition, McLain received ineffective assistance of counsel, which forms a third basis for habeas relief.

I. *Exclusion of Defense Testimony*

A. *Eighth Amendment Violation*

McLain sought to introduce the expert testimony of Dr. Dean Clair, a prison staff psychologist. Dr. Clair had treated McLain, reviewed McLain's prison records, and interviewed McLain for litigation purposes. Dr. Clair was to testify that given a life sentence instead of death, McLain would likely adjust well to prison, and would not pose a threat to prison staff or fellow inmates. *McLain v. Calderon*, 1995 WL 769176, *55. However, the trial court excluded Dr. Clair's testimony, thus violating the mandates of the Eighth and Fourteenth Amendments as interpreted by the Supreme Court in *Skipper*.

The Eighth Amendment requires that the sentencer in a capital case must be allowed to consider "as a mitigating factor, 'any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.' " *Skipper*, 476 U.S. at 4 (*quoting Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)(plurality)). In *Skipper*, the Court applied this general rule to "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison," *Skipper* at 7. Stated differently, "evidence that the defendant would not pose a danger if spared (but incarcerated)" must be allowed. *Id.* at 5. Here, McLain's right

to introduce Dr. Clair's mitigating evidence was clearly violated.

B. *Due Process Violation*

In *Gardner v. Florida,* 430 U.S. 349, the Supreme Court held that it was a violation of due process to apply a sentence of death "on the basis of information which [the defendant] had no opportunity to deny or explain." *Id.* at 362. In *Skipper,* the Court unanimously stated: "Where the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty, it is not only the rule of *Lockett* and *Eddings* that requires that the defendant be afforded an opportunity to introduce evidence on this point; it is an elemental due process requirement . . ." *Skipper,* 476 U.S. at 5, n. 1. The prosecution in this case relied, albeit impliedly, on the argument that McLain would pose a persistent threat to prison safety if incarcerated for life. The prosecution submitted evidence that McLain twice attempted to escape from prison, once restrained a prison guard using a homemade knife, and repeatedly threatened that given the opportunity, he would act violently. In closing argument, the prosecutor underscored this evidence, contending that it showed McLain to be "far from a model prisoner." The prosecution thus created the inference that McLain would pose a danger if sentenced to life imprisonment. The Due Process Clause, as interpreted in *Gardner* and *Skipper,* entitles McLain to rebut this inference.

C. *Prejudice*

On collateral appeal, relief is granted for a constitutional error where it " 'had [a] substantial and injurious effect or influence in determining the jury's verdict.' " *Brecht v. Abrahamson,* 507 U.S. 619, 637 (1993)(quoting *Kotteakos v. United States,* 328 U.S. 750, 76 (1946)). If the error does not rise to that level, it is considered harmless. *Bonin v. Calderon,* 59 F.3d 815, 824 (9th Cir. 1995), *cert. denied,* ___ U.S. ___, 116 S.Ct. 718 (1996). "When a federal judge in a habeas pro-

ceeding is in grave doubt as to whether a trial error of federal law had a 'substantial and injurious effect or influence in determining the jury's verdict,' that error is not harmless. And, the petitioner must win." *O'Neal v. McAninch,* 513 U.S. 432, 436 (1995).

Dr. Clair would have had considerable credibility with the jury because he was employed by the state department of corrections, and not in any way biased in favor of McLain. His expertise in the assessment and treatment of prisoners further augmented his credibility. According to expert testimony presented to the district court, Dr. Clair's testimony would have been crucial to the jury, as future behavior in prison is a major consideration in the penalty phase of capital cases.

Contrary to the state's argument, other evidence and testimony in this case do not duplicate Dr. Clair's testimony. The state contends that the submission of McLain's prison records supplanted the need for an expert opinion based *in part* on those same records. Without expert interpretation, however, these records are considerably less persuasive. Moreover, Dr. Clair relied on his first hand knowledge of McLain, in addition to records, to prepare his testimony.

Similarly, the state argues that other witness testimony effectively substituted for Dr. Clair's opinion. Each of these witnesses, however, lacked either Dr. Clair's credibility, expertise, or foundation of knowledge. Furthermore, only one of these witnesses mentioned that McLain would adapt well to life in prison, and this was not the thrust of his testimony, but only a passing remark.

The trial court did instruct the jury to disregard character evidence of future dangerousness in imposing the death penalty. However, this instruction did not protect McLain's right to offer evidence of future adaptability to prison. Thus, the prosecution's evidence went unrebutted, preventing the jury

from considering McLain's future behavior as a basis for leniency.

While the facts of McLain's brutal crimes are significant aggravating factors, the district court found the mitigating evidence to be significant. *McLain v. Calderon*, 1995 WL 769176, *67-68.[1] In this case, the aggravating evidence did not so overwhelm the mitigating evidence to render harmless the exclusion of Dr. Clair's testimony.

In view of the credibility, persuasiveness, and distinct nature of Dr. Clair's testimony, as well of the significance of the mitigating evidence, we should affirm the district court's conclusion that the exclusion of Dr. Clair's testimony had a substantial and injurious effect on the jury.

II. *Ineffective Assistance of Counsel*

A. *Failure to Investigate*

McLain has shown that his attorney's performance was deficient and that it caused him prejudice. This constitutes ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 687-90 (1984); *Hendricks v. Vasquez*, 974 F.2d 1099, 1109 (9th Cir. 1992). To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

Specifically, "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's

[1]Evidence of McLain's deprived and violent childhood and his resulting mental disorders was found to be mitigating and are discussed in Part II, *infra*.

judgments." *Strickland,* 466 U.S. at 691. Here, McLain's attorney, Steve Pell, failed to: 1) discover all relevant mitigating evidence; 2) develop a social history based on all available records; or 3) provide McLain's mental health expert with all available social history records. Evidence of McLain's childhood sexual abuse, diagnosed brain damage, multiple head injuries, physical abuse, abject poverty, attempted suicides, and lack of treatment was all omitted. Pell did call McLain and two other members of McLain's family to give testimony regarding McLain's background. Dr. Jerome Evans also testified, regarding McLain's mental condition. However, Pell never obtained releases to review McLain's confidential records. Therefore, Pell's decision to present this testimony was not based on adequate investigation. As the district court stated: "Pell's failure to investigate this mitigating evidence cannot be construed as reasonable because he did not consciously explore the possibility of presenting it." *McLain v. Calderon,* 1995 WL 769176, *100 (C.D. Cal.). Pell's failure to investigate and present important mitigating evidence, taken alone, constitutes ineffective assistance of counsel.

CONCLUSION

I agree with the majority that *Hamilton* error merits a grant of habeas corpus relief in this case. McLain's defense was further harmed by the exclusion of persuasive expert testimony and inadequate investigation by counsel. I write separately to note that these errors provide additional bases upon which to grant habeas corpus relief and CONCUR in the opinion.

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Appendix B

DEATH PENALTY

ENTERED
Clerk, U.S. District Court
AUG 24 1995
Central District of California
By Deputy

FILED
AUG 22 1995
Clerk U.S. District Court
Central District of California
By Deputy

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT CRUZ McLAIN,	)	
	)	
Petitioner,	)	CASE NO. CV 89-3061 JGD
	)	
v.	)	MEMORANDUM OPINION
	)	GRANTING IN PART AND
ARTHUR CALDERON, et al.,	)	DENYING IN PART
	)	PETITION FOR WRIT OF
Respondents,	)	HABEAS CORPUS
	)	

Petitioner Robert Cruz McLain is an inmate on death row. He invoked the jurisdiction of this Court by requesting, pursuant to 21 U.S.C. s 848(q), appointment of counsel to assist him in preparing and litigating a petition for writ of habeas corpus. Currently before the Court is his Third Amended Petition filed on December 6, 1993.

The Court held an evidentiary hearing over the course of five days in April and May 1993. At the evidentiary hearing witnesses were called and exhibits were received concerning the petitioner's second, third, fourth, fifth, eighth, and twenty-second claims for relief. Over the course of three days in February 1994, the Court

held a second evidentiary hearing concerning the petitioner's twenty-eighth claim for relief. At the second evidentiary hearing witnesses were called and exhibits were received.

The Court has considered the testimony and exhibits at the evidentiary hearings, relevant portions of the state court record, the arguments of counsel, and the papers, pleadings and records on file herein. Based thereon, the Court makes the following findings of fact and conclusions of law:

FACTS

In 1971, McLain was convicted of raping and molesting Jodi Whitman and her friend and attempting to rape and molest a third person, Sherrie Yunker in Ventura, California. McLain was released from prison in 1978 and was living in Northern California. In November 1979, McLain returned to Ventura accompanied by his 16-year-old nephew Teddy Willis and Willis' friend Lloyd Ketcherside.

The threesome went to Whitman's apartment and attempted to break in but were scared away. They picked up another woman, Joni Kelley; she was later raped and murdered. On the way back to Northern California, their car broke down. They stopped another person, Diana Bazargani, murdered her and stole her car.

McLain was convicted of murdering Bazargani at a trial in Solano County. After a jury trial on the appropriate penalty, McLain was sentenced to life imprisonment without the possibility of parole.

McLain was then tried for the Kelley murder in Ventura. The jury convicted him of rape and murder and sentenced him to death. The Ventura jury also convicted McLain of several other attempted crimes and conspiracies in connection with the events at Whitman's apartment.

For the crimes relating to the attempted break-in at Whitman's apartment, the Ventura trial court sentenced McLain to slightly over 50 additional years to run consecutively to each other, consecutive to the sentence on the Kelley murder charge, and consecutive to the unparolable life sentence in Solano County arising from the Bazargani murder. Accepting the jury's verdict, the Ventura trial court sentenced McLain to death for the murder of Joni Kelley.

The habeas petition currently before the Court challenges the constitutionality of the Ventura conviction and sentence of death.

The California Supreme Court affirmed the verdict and sentence. People v. McLain, 46 Cal.3d 97, 249 Cal. Rptr. 630, 757 P.2d 569 (1988). Thereafter, it denied McLain's petition for rehearing. After the United States Supreme Court denied McLain's petition for writ of certiorari, McLain v. California, 109 S. Ct. 1356 (1989), the California Supreme Court denied McLain's petition for writ of habeas corpus.

Federal proceedings were initiated in May 1989 and new counsel were appointed three weeks later. After a return to state court for exhaustion purposes, McLain filed a First Amended Petition on August 28, 1991. The Court allowed McLain to file a Second Amended Petition in March 1993.

The Court held an evidentiary hearing on McLain's claims relating to the jailhouse informants who testified at McLain's trial, and the failure of McLain's trial counsel, Steve Pell, to develop evidence concerning McLain's brain damage and abuse as a child. The hearing was held April 13 through 16, April 29, and May 4, 1993.

Shortly after post-hearing briefing was completed, but while the case was still under submission, McLain sought permission to file a Third Amended Petition to include a claim of jury misconduct that he had only recently discovered. Finding the claim exhausted and not procedurally barred -- due to the State's practice of

inconsistently invoking timeliness as a procedural default in habeas -- the Court allowed McLain to file his Third Amended Petition on December 6, 1993. The Court scheduled a hearing on the newly-added jury misconduct claim. The second hearing was held on February 3, 11, and 25, 1994.

This Memorandum Opinion contains the Court's findings of fact and conclusions of law regarding all claims raised in the pleadings before this Court.

PART I -- PRELIMINARY PROCEDURAL MATTERS

I. EXHAUSTION

The Attorney General contends that several of McLain's claims are unexhausted. Because exhaustion is a procedural defect that could prevent the Court from considering any of the claims in the current petition, Rose v. Lundy, 455 U.S. 509, 514 (1982), the Court addresses the exhaustion disputes prior to addressing the merits of any of the claims.

A. Respondent Has Waived Any Purported Exhaustion Defects

The Court finds Respondent's exhaustion arguments to be without merit for two separate and independent reasons. First, the Court finds that Respondent has waived the defense of exhaustion by failing to raise it at an earlier stage of the proceedings. Not only was this case held in abeyance for 18 months during 1990 and 1991, but McLain also filed a supplemental state habeas petition contemporaneous with ongoing federal proceedings in late 1993. The Attorney General purports to have reserved his right to assert an exhaustion defense at a later time. He purportedly did so, however, by burying this contention in a legal memorandum appended to his Answer. The Attorney General did not move to dismiss the petition or

any of the claims or to have federal proceedings held in abeyance pending further exhaustion. Nor did he otherwise bring the alleged exhaustion defects to the Court's attention during any of the numerous status conferences or motion hearings. The Attorney General never suggested that either of the evidentiary hearings would be inappropriate on the ground that the petition contained unexhausted claims. Not until the Attorney General filed his comprehensive briefing on the claims that were not the subject of the first evidentiary hearing -- in October 1993 -- did the Attorney General formally seek any relief based on the alleged exhaustion defect.

The issue of exhaustion should have been raised and insisted upon long ago. "The appropriate time to assess whether a prisoner has exhausted his state remedies is when the federal habeas petition is filed, not when it comes on for hearing in the district court." Brown v. Wells, 11 F.3d 914, 915 (9th Cir. 1993). There is a compelling reason for this. Exhaustion defects could render all proceedings in the case a nullity. Lundy, 455 U.S. at 520-21. The Attorney General cannot wait until the end of the case, opting to insist upon exhaustion only after it appears that the federal court may reach a decision on the merits adverse to the State. Granberry v. Greer, 481 U.S. 129, 134 (1987). Allowing delayed invocation of the exhaustion defense would invite abuse by the parties.

After the case has been in federal court for so many years and two evidentiary hearings have been held, it is too late to complain of timing defects. Any exhaustion problems could have been cured long ago. The Court finds that Respondent has waived any defense based on exhaustion defects.

///

B. Respondent Has Waived the Defense of Procedural Bar

The Attorney General attempts to capitalize on the delay that it has in part created by failing to assert its exhaustion defense earlier. The Attorney General contends that, due to the late date by which any supplemental exhaustion petition would be presented, the state supreme court would now likely hold any previously unpresented claims as procedurally defaulted under the state's timeliness rules.

Whether a claim is in procedural default, however, is determined as of the date the federal petition was filed. Brown, 11 F.3d at 914. This case has twice returned to the state court for exhaustion purposes. There is no clear indication that the state courts would have unquestionably rejected the allegedly "new" aspects of the challenged claims on the basis of timeliness had those "modifications" been included in one of the earlier state habeas petitions.

The Court finds that Respondent has waived the defense of procedural default and bar.

C. Respondent's Substantive Exhaustion Arguments Lack Merit

1. Eighth Claim

The Attorney General argues that, to the extent Claim 8 is founded upon the Fifth and Sixth Amendments, the claim was never exhausted and is now procedurally barred. A claim cannot be procedurally barred if it has been properly exhausted -- i.e., if it has been fairly presented to the state's highest court. A federal claim "is fairly presented if the petitioner has described the operative facts and legal theory upon which his claim is based." Tamapua v. Shimoda, 796 F.2d 261, 262 (9th Cir. 1986).

McLain fairly presented, on direct appeal, his claim that the trial court violated his Fifth and Sixth Amendment rights by failing to instruct the jury on the unreliability of informant testimony. The state court denied this claim on the merits. McLain, 46 Cal.3d at 107. The claims were properly exhausted and McLain is not barred from pursuing these claims in this federal habeas proceeding.

2. Twelfth Claim

McLain fairly presented his claim that the retroactive application of People v. Anderson, 43 Cal.3d 1104, 240 Cal. Rptr. 585 (1987) would violate his rights to due process and equal protection, the Ex Post Facto Clause, and the Eighth Amendment. The Attorney General's contention that McLain should have presented these arguments in his briefs on direct appeal is frivolous. Anderson was not even decided until after McLain's direct appeal was fully briefed and argued. While a petition for rehearing might not ordinarily be the appropriate method for presenting a new claim of error, McLain cannot be faulted for failing the contest the retroactivity of a law that did not yet even exist. McLain challenged the retroactive application of Anderson at his first opportunity to do so. The claim was properly presented by way of petition for rehearing. Cf. Castille v. Peoples, 489 U.S. 346, 351 (1989).

In his petition for rehearing, McLain argued that retroactive application of Anderson would be unfair and a violation of the Ex Post Facto Clause. "Unfairness" is the touchstone of due process which, in turn, is the focus of the Fifth and Sixth Amendment claims presented here. A petitioner need not cite "book and verse on the federal constitution" in order to satisfy exhaustion. Picard v. Connor, 404 U.S. 270, 277 (1971), cited in Duncan v. Henry, 115 S. Ct. 887 (1995). Accord Tamapua, 796 F.2d at 262. A federal claim will be found exhausted so long as

"the 'ultimate question for disposition' will be the same despite variations in the legal theory or factual allegations urged in its support." Miller v. Rowland, 999 F.2d 389, 391 (9th Cir. 1993), cert. denied, 114 S. Ct. 1378 (1994), quoting Picard, 404 U.S. at 277. The mere addition of a citation to the Eighth Amendment does not render a claim unexhausted. McQueary v. Blodgett, 924 F.2d 829, 833 (9th Cir. 1991) (due process and equal protection sufficiently presented Eighth Amendment claim premised on same arguments). The Attorney General fails to explain how the current federal claims are in any way distinct from those presented to the state court. The twelfth claim for relief is exhausted.

3. Fifteenth Claim

As the Attorney General concedes, McLain specifically cited Skipper v. South Carolina, 476 U.S. 1 (1986), in his appellate briefs. Skipper plainly invoked both the Eighth Amendment and Fifth Amendment due process clause[1/] as dual bases for its judgment. Skipper, 476 U.S. at 4-5, 5 n.1. Furthermore, Skipper's Eighth Amendment analysis specifically looked to the prosecutor's closing argument regarding potential future harm as a basis for concluding that the error was not harmless. Id., 476 U.S. at 8. Although the constitutional foundations for the Eighth Amendment error may be conceptually distinct from the Fifth Amendment's, Skipper's analysis of the harm caused by the Eighth Amendment violation was closely connected to concerns of procedural due process. The raising of one ground brings the other to the forefront almost automatically.

If this were not enough, McLain's supplemental brief explicitly referred to "due process" in arguing his Skipper

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1. McLain fails to explain how the Sixth Amendment dimension of this claim differs from the Fifth Amendment aspect. Thus, they are treated together as the "due process" component discussed in Skipper and Gardner.

claim. He specifically argued that the exclusion of Dr. Clair's testimony not only violated the Eighth Amendment, but also "the principles of due process." (Applnt's Suppl. Brf., Doc. B-13, at 3.) He further complained that the exclusion "unfairly" curtailed the defense's ability to rebut the prosecutor's evidence and argument "suggest[ing] that appellant would be a negative influence in prison." (Applnt's Suppl. Brf., Doc. B-13, at 4.) Indeed, as support for the last quoted phrase, McLain cited Justice Powell's concurring opinion in Skipper, whose legal foundation rested exclusively on due process grounds.

Thus, all aspects of the fifteenth claim for relief were exhausted.

4. Seventeenth Claim

On direct appeal, McLain initially raised only one argument pertaining to the penalty phase -- that the trial court committed prejudicial error in instructing the jury that a non-parolable life sentence might some day be commuted to a life sentence that included the possibility of parole. (AOB, Doc. B-1, pp. 98-103.) He argued that the instruction was unfairly prejudicial because it emphasized the possibility of release and tended to unduly suggest that commutation and parole were not simply possible, but probable. He also argued that the modified instruction was misleading in that it implied that a death sentence might not be commutable to a parolable life sentence and, therefore, the only way to assure McLain's permanent removal from society was to reach a death verdict. (AOB, Doc. B-1, pp. 98-103; Reply Brf, Doc. B-3, pp.26-27.)

McLain argued this claim again in his reply brief, in supplemental briefs, and on rehearing. (Docs. B-3, B-12, B-17.) The consistent thrust of these arguments was that the instruction unfairly suggested that a non-parolable life sentence would be commuted and that McLain would be eligible for parole and eventually released unless

sentenced to death. These are the same arguments raised in McLain's Seventeenth Claim.

McLain's arguments in state court fairly presented the claim raised in his Third Amended Petition. The claim is exhausted. See Miller, 999 F.2d at 391, Tamapua, 796 F.2d at 262, McQueary, 924 F.2d at 833.

II. TEAGUE RETROACTIVITY

Respondent contends that several of McLain's claims are barred by the Supreme Court's habeas retroactivity doctrine announced in Teague v. Lane, 489 U.S. 288 (1989) (plurality). Since the State argues that McLain "seeks the benefit of a new rule of constitutional law, the court must apply Teague before considering the merits of the claim." Caspari v. Bohlen, 114 S. Ct. 948, 953 (1994) (emphasis original).

In Teague, a four-justice plurality of the Supreme Court proclaimed that they would no longer announce or enforce "new rules of constitutional criminal procedure" during habeas corpus review. Teague, 489 U.S. at 310. In Penry v. Lynaugh, 492 U.S. 302 (1989), a fifth member joined their ranks and established Teague's retroactivity doctrine as a rule of law.

A. Respondent Has Failed to Discharge its Burden under Teague

In tracing the contours of the new habeas retroactivity doctrine, the Supreme Court has identified several clear points in the analytical framework. Caspari, 114 S. Ct. at 953. First, the court must determine the date on which petitioner's conviction and sentence became final. Second, the court must ascertain the state of the law on that date in order to determine whether the rule sought to be applied "breaks new ground or imposes a new obligation on the States." Teague, 489 U.S. at 301. Third, if the petitioner is attempting to invoke a "new rule," the court

must then determine whether the rule comes within either of the two exceptions to Teague. It was no hyperbole for Judge Legge to conclude: "It is clear from a review of the cases that have addressed retroactivity that the Teague analysis is complex." Odle v. Calderon, 884 F. Supp. 1404, 1411 (N.D. Cal. 1995) (Legge, J.), citing Graham v. Collins, 113 S. Ct. 882 (1993), Stringer v. Black, 503 U.S. 222 (1992), Penry, 492 U.S. 302.

"The Teague bar to the retroactive application of new rules is not, however, jurisdictional." Schiro v. Farley, 114 S. Ct. 783, 788 (1994). It is an affirmative defense. Id. Like any other affirmative defense, Respondent has the burden to demonstrate that the defense applies. Id.

Respondent has determined when McLain's conviction and sentence became final. Beyond that, however, his invocation of the Teague bar is nothing short of perfunctory. The Attorney General has not outlined the state of the law relevant to any of the claims as the law existed at the relevant time. Nor has Respondent analyzed the claims he seeks to bar in light of the applicable law at that time. Nor has Respondent discussed whether McLain's claims fall within either of Teague's exceptions. Because the Attorney General has not satisfied the burden imposed on him by Caspari, the State has not met its burden of demonstrating that Teague bars any of McLain's claims. The Court rejects Respondent's retroactivity arguments on this separate and independent basis.

B. The Non-Retroactivity Arguments Lack Merit

As noted by Justice O'Connor, "'[S]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands.'" Teague, 489 U.S. at 310 (plurality) (brackets in original), quoting Engle v. Isaac, 456 U.S. 107, 128 n.33 (1982). Thus, the Teague retroactivity analysis is intended

to "validate[] reasonable, good-faith interpretations of existing precedents made by state courts," and thus [to] effectuate[] the States' interest in the finality of criminal convictions and [to] foster [] comity between federal and state courts." Gilmore v. Taylor, 113 S. Ct. 2112, 2116 (1993), quoting Butler v. McKellar, 494 U.S. 407, 414 (1990).

1. Third and Fourth Claims

Claims 3 and 4 arise out of the State's use of jailhouse informants as witnesses at McLain's trial. McLain contends that the informants fabricated testimony and that the State knowingly or recklessly used this perjured testimony in violation of his right to due process. He also complains that the prosecutor violated his due process rights by failing to inform the defense both that the informants had been acting as de facto law enforcement agents and that they fabricated testimony.

The State fallaciously argues that it cannot be criticized for using perjured testimony by jailhouse informants because this would amount to a "new rule" under Teague. It has long been the law that the "deliberate deception of court and jury by the presentation of testimony known to be perjured" is "inconsistent with the rudimentary demands of justice." Mooney v. Holohan, 294 U.S. 103, 112 (1935). Accord, Napue v. Illinois, 360 U.S. 264 (1959), Giglio v. United States, 405 U.S. 150 (1972). More recently, the Supreme Court explained that a "conviction obtained by the knowing use of perjured testimony is fundamentally unfair." United States v. Bagley, 473 U.S. 667, 678 (1985). Setting the standard of proof, the Supreme Court held that such a conviction "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Bagley, 473 U.S. at 678. Accord United States v. Agurs, 427 U.S. 97, 103, 110 (1976), Brown v. Borg, 951 F.2d 1011, 1015 (9th Cir. 1991).

The State's Teague objection to McLain's challenges to the allegedly perjurious nature of the informants' testimony is patently without merit. McLain seeks to apply old rules of constitutional law to these new facts. Nothing in Teague or its progeny suggests that this is inappropriate. Teague only prohibits the invocation of new rules; it has no application where, as here, the petitioner seeks to apply "a rule of ... general application" to a new set of facts. Wright v. West, 112 S. Ct. 2482, 2499 (1992) (Kennedy, J., concurring). Accord Stringer, 503 U.S. at 227-32. Teague poses no bar to these claims.

2. Fifth Claim

McLain's fifth claim for relief is also related to the jailhouse informant testimony. In this claim, however, McLain asserts that his conviction is invalid because it is founded upon materially unreliable testimony. Once again, the Attorney General misconstrues Teague.

McLain does not broadly assert that, as a matter of constitutional law, prosecutors should be universally precluded from relying on jailhouse informant testimony in securing convictions or death verdicts. Rather, McLain's fifth claim is premised upon the longstanding principle of due process that convictions must be based on reliable and credible evidence, e.g., Johnson v. Mississippi, 486 U.S. 578, 590 (1988), and that -- irrespective of what facts McLain was able to establish by a preponderance of the evidence at the federal evidentiary hearing -- these informants were important witnesses and the reliability of their trial testimony is inherently suspect. It has long been recognized that the testimony of informants, especially jailhouse informants, should be treated with suspicion. United States v. Bernal-Obeso, 989 F.2d 331, 333-35 (9th Cir. 1993). The claim that these informants provided testimony that is not sufficiently reliable for a death verdict would not amount to a "new constitutional rule of

criminal procedure," but simply, at most, a new factual setting for an old rule.

Moreover, given its intensive focus on the trustworthiness of the outcome, there is every reason to believe that the rule invoked in this claim falls within Teague's exception for "'new procedures without which the likelihood of an accurate conviction is seriously diminished' or which implicate 'the fundamental fairness of the criminal proceeding.'" Harmon v. Marshall, 57 F.3d 763, 765 (9th Cir. 1995), quoting Teague, 489 U.S. at 311, 313.

3. Sixteenth Claim

Similarly Teague does not bar claims that the trial court erroneously excluded evidence. True, the Supreme Court has not firmly stated that a capital defendant must be allowed to establish that more culpable accomplices will be granted sentences more lenient than death. This does not, however, ineluctably invoke the prohibition against announcing "new rules of constitutional criminal procedure" on habeas. Teague v. Lane, 489 U.S. 208 (1989). The "rule" invoked is clear and well-established -- a capital defendant must be allowed to present any relevant evidence that is "mitigating in the sense that [it] might serve as a basis for a sentence less than death.'" Mak v. Blodgett, 970 F.2d 614, 623 (9th Cir. 1992) (quoting Skipper, 476 U.S. at 4-5), cert. denied, 113 S. Ct. 1363 (1993). The rule is not new -- it derives from Lockett v. Ohio, 438 U.S. 586 (1978) (plurality), which was decided not only before the end of McLain's direct appeal, but before his trial as well.

The Supreme Court has limited the reflexive invocation of Teague when the only argument against retroactivity is the claimed "new application" of an "old" rule. The "inquiry is to determine whether a particular decision has really announced a 'new' rule at all or whether it has simply applied a well- established

constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law." Wright v. West, 112 S. Ct. at 2497 (O'Connor, J., concurring) (emphasis in original).

> [T]he standard for determining when a case establishes a new rule is "objective," and the mere existence of conflicting precedents does not necessarily mean a rule is new. If the proffered factual distinction between the case under consideration and pre-existing precedent does not change the force with which the precedent's underlying principle applies, the distinction is not meaningful, and any deviation from precedent is not reasonable.

Wright, 112 S. Ct. at 2497 (O'Connor, J., concurring, joined by Blackmun and Stevens, JJ.). Accord Stringer, 503 U.S. at 236-37.

Justice Kennedy provided a similar explanation:

> Whether the prisoner seeks the application of an old rule in a novel setting depends in large part on the nature of the rule. If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule. The rule of Jackson v. Virginia, 443 U.S. 307 (1979), is an example. By its very terms it provides a general standard which calls for some examination of the facts. The standard is whether any rational trier of fact could have found guilt beyond a reasonable doubt after a review of all the evidence, so of course there will be variations from case to case. Where the beginning point is a rule of this general application, a rule designed for a specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent.

Id., 112 S. Ct. at 2499 (Kennedy, J., concurring).

The rule of Lockett can hardly be called "fact-specific." It is a rule of general application requiring States to allow sentencers to consider all relevant mitigating evidence that would provide a basis for a verdict less than death. (Lockett does not, on the other hand, entitle capital defendants to perform an abolitionist crusade -- i.e., to argue about the general propriety of capital punishment in a manner that is not directly tied to the facts of the case before the jury. See Harris v. Pulley, 692 F.2d 1189, 1203-04 (9th Cir. 1982) (Harris I), rev'd on other grounds, 456 U.S. 37 (1984).) Its application "of necessity requires a case-by-case examination of the evidence" and is "designed for the specific purpose of evaluating a myriad of factual contexts." Wright, 112 S. Ct. at 2499 (Kennedy, J., concurring). Indeed, it is noteworthy that the Supreme Court found its Skipper decision -- one of Lockett's progeny -- to be fully retroactive, citing a case indicating that it had "merely ... applied settled precedents to [a] new and different factual situation[]." Truesdale v. Aiken, 480 U.S. 527 (1987), citing United States v. Johnson, 457 U.S. 537, 549 (1982).

4. Seventeenth Claim

In a brief filed eight months after the Ninth Circuit decision was rendered -- and seven months after McLain filed his first brief calling the case to the Court's attention -- the Attorney General asserted that the Ninth Circuit's decision in Hamilton v. Vasquez, 17 F.3d 1149 (9th Cir.), cert. denied, 114 S. Ct. 2706 (1994), created a new rule of law that is barred by Teague.

McLain's seventeenth claim asserts that the modified Briggs Instruction both unduly emphasized the possibility of commutation and release while simultaneously providing the jury with materially inaccurate information suggesting that commutation and release were in fact

likely. McLain argues that the instruction violated his due process rights to a fair and reliable penalty verdict.

The Attorney General is correct that, prior to Hamilton, no court had expressly condemned the precise misinformation that was contained in the instruction given during McLain's trial. Yet, well before McLain's appeal was final, the Supreme Court had confirmed that jurors cannot be misled as to the significance of their verdict. Caldwell v. Mississippi, 472 U.S. 320 (1985) (plurality). Cf. California v. Ramos, 463 U.S. 992, 1009 (1983). Indeed, throughout Ramos, the Supreme Court repeatedly emphasized that the unmodified Briggs Instruction "corrects a misimpression" that a non-parolable life sentence could not be commuted "and supplies the jury with accurate information." Id., 463 U.S. at 1009. See also id. at 1004, 1012. The accuracy of the information provided to the jury was again considered the crucial question when the Supreme Court reversed another death sentence based on a misdescription of the jury's sentencing role. Caldwell, 472 U.S. at 336 (plurality), id., at 341-42 (O'Connor, J., concurring). Most recently, the Supreme Court again reinforced that simply biasing the jury in favor of death is not the crucial question -- after all, that is the function of all aggravating evidence and argument -- the concern is over the information's accuracy. Romano v. Oklahoma, 114 S. Ct. 2004 (1994).

The Ninth Circuit's decision in Hamilton relies squarely on the guidelines established in Ramos. Ramos was decided well before McLain's appeal became final. Thus, the "rule" of Hamilton is nothing more than the "rule" of Ramos -- that the jury may be provided with information regarding commutation so long as the information is not false or misleading -- applied to a modified version of the Briggs Instruction. The arguments are nothing more than attempts to apply "a rule of ... general application" to a new set of facts. See Wright, 112 S. Ct. at 2499 (Kennedy, J., concurring), Stringer, 503 U.S.

at 227-32. The arguments premised on Hamilton are not barred by Teague.

PART II -- DISCUSSION

I. First Claim: Improper Joinder

McLain's first claim for relief asserts that the trial court improperly permitted the State to join the charges relating to Jodi Whitman with the charges for which the State sought the death penalty, those relating to the murder of Joni Kelley. McLain asserts that, as a result, his conviction and death sentence were unlawfully imposed in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

A. Prejudice on Kelley Charges

McLain asserts that the joinder of the Whitman and Kelley charges allowed the introduction of inflammatory evidence related to the Whitman charges that unfairly prejudiced his trial on the Kelley charges.

Petitioner argues that joinder led the jury to find that McLain was predisposed to commit the Kelley offense, permitted the jury to improperly cumulate evidence in deliberating on the Kelley charges, and allowed the State to urge the jury to first make findings on the Whitman charges and then to apply those findings as evidence of guilt on the Kelley charges.

McLain specifically attacks two categories of evidence that were admitted because of the joinder that he asserts would have been inadmissible during the guilt phase if the charges had been severed. The first category is the evidence of McLain's 1971 rape convictions. The second category is the evidence of his involvement in the then-pending Whitman charges: the attempted burglary of the Whitman residence and the attempted rape and murder of Jodi Whitman.

The first category of evidence included:

(1) McLain's 1971 conviction for the rape of Jodi Whitman;

(2) information revealing that Whitman was eleven years old at the time of the 1971 offense; and

(3) a stipulation that McLain had also been convicted in 1971 for the rape of Lisa Donaldson and that Donaldson was a minor at the time.

McLain asserts that this evidence was irrelevant to the determination of guilt for the Kelley charges and that the trial court's limiting instruction was ineffective and insufficient.

The second category of evidence is the evidence relating to the Whitman charges. McLain alleges that the prosecutor improperly encouraged the jury to use evidence relating to the Whitman charges in deciding the Kelley charges. McLain asserts that there was no factual relationship between the Whitman crimes and the Kelley crimes that would justify using the evidence of one in support of the other. He argues that the temporal or geographical similarities do not give rise to inferences of motive, plan, intent, or other common element.

In assessing whether the joinder of offenses is constitutionally impermissible, the Ninth Circuit has explained:

> [t]he propriety of a consolidation rests within the sound discretion of the state trial judge. The simultaneous trial of more than one offense must actually render petitioner's state trial fundamentally unfair and hence, violative of due process before relief pursuant to 28 U.S.C. § 2254 would be appropriate.

Featherstone v. Estelle, 948 F.2d 1497, 1503 (9th Cir. 1991) (quoting Tribbitt v. Wainwright, 540 F.2d 840, 841 (5th Cir. 1976), cert. denied, 97 S. Ct. 1184 (1977)).

The Supreme Court has "'defined the category of infractions that violate "'fundamental fairness"' very narrowly.'" Estelle v. McGuire, 502 U.S. 62, 73 (1991)

(quoting Dowling v. United States, 493 U.S. 342, 352 (1990)). The State correctly observes that, in the context of consolidated charges, the Supreme Court has recognized that (1) the jury is expected to follow instructions in limiting evidence to its proper function, and (2) the convenience of trying different crimes against the same person in one trial is a valid governmental interest. Spencer v. Texas, 87 S. Ct. 648, 653 (1966).

In the present case, McLain was not prejudiced by the admission of the evidence of the 1971 convictions. It did not render his trial fundamentally unfair. The trial court adequately instructed that the jury on the limitations on the use of this evidence and this Court must assume the jury followed the instructions as given.

The trial court expressly instructed the jury that the evidence of McLain's 1971 conviction for the rape of Whitman could be used only for the then-pending Whitman charges but not for the Kelley charges. The trial court also instructed the jury not to consider the prior rape convictions in evaluating McLain's credibility. The trial court further instructed the jury that it could not consider evidence of McLain's other crimes to prove that he was a person of bad character or had a disposition to commit crimes.

The trial court informed the jury that the evidence of other crimes "was received only as to the offenses pertaining to Jodi Whitman and may be considered by you only as to those offenses." (C.T. 1861.) The court also informed the jury that it could use the other crimes evidence only to determine (1) whether there was a logical connection between the 1971 offense and the Whitman offense, (2) whether there was corroboration of the prosecuting witness, (3) whether the requisite intent existed, (4) the identity of the person who committed the crimes, (5) the motive for the commission of the crime charged, (6) whether McLain had the knowledge and means that might have been useful in committing the crime charged, and (7) the existence of a conspiracy. The

trial court then reiterated that the evidence relating to the 1971 offense was admitted for those limited purposes and only as to the offenses relating to Jodi Whitman. The court directed the jury not to use the conviction for any other purpose.

These instructions were reinforced by the prosecutor's closing argument. He expressly told the jury not to consider the evidence of the 1971 convictions as evidence of McLain's propensity to engage in criminal behavior generally or to commit sexual crimes specifically. (R.T. 3838.) He also told the jury not to consider it as evidence that McLain was a "lousy" person.

Thus, McLain was sufficiently protected from an improper use of the evidence of the 1971 convictions.

Likewise, the evidence relating to the Whitman charges did not render McLain's trial on the Kelley charges fundamentally unfair.

The prosecutor connected the Whitman and Kelley charges by arguing that if the jury found that McLain had attempted to rape or murder Whitman then it should consider what relationship McLain's commission of the Whitman offenses might have to the Kelley charges. He specifically argued that it might be logical to conclude that if McLain had been frustrated in his attempts to get revenge on Whitman, he may have taken out that frustration on Kelley. (R.T. 7840.)

Arguably, joinder of the claims should not have been allowed because the Whitman charges were not sufficiently related to the Kelley charges. But the question is not whether the joinder was generally proper, but whether it rendered petitioner's trial fundamentally unfair.

Evidence of prior bad acts is relevant to show a motive. Although the argument that the events at Whitman's apartment provided the motive for the murder of Kelley may be logically weak, the jury was capable of determining whether to accept it. The prosecutor himself backed away from the argument that the Kelley offense followed from frustration over the failure to find Joni

Whitman. The prosecutor admitted in his closing argument that it was not clear exactly when the Kelley offenses took place and that it was possible that they occurred prior to going to Joni Whitman's apartment. (R.T. 7848.)

After a review of the record, the Court concludes that the joinder of the Whitman charges with the Kelley charges, while potentially inflammatory, did not render the trial on the Kelley charges fundamentally unfair.

B. Prejudice on Whitman Charges

Petitioner further argues that joinder tainted the penalty phase. He asserts that without joinder it is unlikely he would have been found guilty of the attempted break-in at Whitman's apartment. He argues that the prosecutor therefore would not have been able to argue in the penalty phase, as an aggravating circumstance, that he returned to Ventura to seek revenge against Whitman, a former victim.

McLain has presented no cogent theory as to how the joinder of the Kelley charges with the Whitman charges could have led the jury improperly to convict him on the Whitman charges. There was no evidence during the guilt phase that was relevant only to Kelley charges and which the jury could not have permissibly used for the Whitman charges. Therefore, this argument does not support a finding of fundamental unfairness.

The Court therefore denies Petitioner's first claim for relief.

II. Second Claim: Jailhouse Informants -- Knowing Use of Perjured Testimony

After his arrest, McLain was incarcerated in the Vallejo branch of the Solano County Jail. McLain was placed in a long-term holding cell along with many other

inmates, including Edward DeFilipis, Zolando Hockett, and Doyle Smith.

Testifying at McLain's trial under a grant of immunity from both Ventura and Solano counties, Ketcherside attempted to emphasize McLain's involvement in the crimes while minimizing his own role. Circumstantial evidence strongly, although not incontrovertibly, suggested McLain's participation. The prosecution sealed its case through three jailhouse informants who testified that McLain admitted to them that he had committed the charged crimes and told them details of how the crimes were committed.

DeFilipis and Hockett testified at the Ventura trial that McLain made several incriminating statements to them while they were housed together. DeFilipis and Hockett had previously given similar testimony at McLain's Solano County trial. The prosecution read into the record similar testimony that Doyle Smith gave at McLain's preliminary hearing.

The Court finds that McLain has failed to prove by a preponderance of the evidence that any of the testimony by the jailhouse informants was perjurious. The Court also finds that there was no deliberate wrongdoing by any member of the prosecution team. The Court further finds that, while not exhaustive, the prosecutor's investigation was sufficient under the standards prevailing in the early 1980's.

III. There is Insufficient Proof of Perjurious Testimony by the Jailhouse Informants

1. DeFilipis

As demonstrated both by his history of varied stories as well as the Court's observation of DeFilipis on the witness stand at the evidentiary hearing, DeFilipis has an obvious ability -- and willingness -- to mold his story to suit his audience. Although DeFilipis' willingness to defile the

oath when it pleases him is disturbing, McLain still bears the ultimate burden to prove, by a preponderance of the evidence, that DeFilipis' testimony at the Ventura trial was in fact false. There is nothing to corroborate DeFilipis' transitory version that McLain never varied from denying guilt. On the other hand, Respondent has submitted credible evidence suggesting that, if McLain did speak with DeFilipis (which is not contested), he likely acknowledged his personal involvement in the Ventura crime.

The Court does not credit DeFilipis' allegation that Solano County Detective Hind provided him with a document that purported to be McLain's handwritten, unsigned confession. While Detective Hind did provide DeFilipis with a document during the initial interview, the Court finds that the document provided was DeFilipis' own handwritten notes. The Court finds this version of events all the more plausible in light of the fact that DeFilipis admits that he took personal notes, admits that he gave them to Hind, and that DeFilipis reviewed those notes before giving the tape-recorded statement to Hind. Also significant is the fact that -- other than the impostor Antonio Cortez Buckley -- DeFilipis is the only informant who has ever claimed that he was directly provided with written information about the case. Hocket has steadfastly denied that Hind presented him with any written documents purporting to include statements by McLain. The Court finds that the most plausible version of events is that contained in the verbatim transcript prepared by Hind of his tape-recorded interview with DeFilipis on February 5, 1980. (Exh. 318.)

In other words, the Court finds that DeFilipis had handwritten notes which had been placed with his personal property. When the interview started, DeFilipis mentioned that his conversations with McLain had occurred three days earlier and that he would have a better recollection of the meeting if he had his notes with him. Hind obtained DeFilipis' notes and gave them to him

to review. After reviewing his own notes, Hind and DeFilipis continued the interview. The evidence strongly suggests that, when questioned by McLain's attorneys and investigators, in an effort to provide them with information they wanted so that they would leave him alone, DeFilipis embellished upon this story by stating that the notes Hind gave him were actually represented as being an unsigned handwritten confession by McLain.

2. Hockett

With respect to Hockett, McLain does not accuse law enforcement of directly providing information to the informant. Rather, McLain alleges a more subtle form of fabrication -- he asserts that during the interviews, Hind "just led [Hockett] in the direction he wanted [him] to go." (Exh. 722, 13:28-14:1, 13:2- 6.) Hockett reaffirmed these assertions at the evidentiary hearing. Hockett confirmed that Hind questioned him in this way specifically with regard to the Ventura crimes as well as with the Solano crimes.

The Court does not find Hockett's allegations to be credible. Hockett testified at the Ventura trial that, during his interview with Hind, Hockett only mentioned the Ventura crime in passing and did not provide Hind with any of the details that McLain had mentioned about the Ventura crimes. (R.T. 6548.) Consistent with Hockett's trial testimony, Hind's report of his interview with Hockett mentions the Ventura crimes only in passing. (Exh. 323.)

The Court finds that, consistent with Detective Hind's practice of documenting his conversations, if they had discussed the Ventura crimes in any significant detail or if Hockett had made any significant statements regarding the Ventura crimes, Detective Hind would have include those statements in his report. The absence of details about the Ventura crime strongly suggests that Hind and Hockett did not discuss the details of the Ventura crime. The Court therefore finds that Hind in fact did not ask

Hockett leading questions about the Ventura crime or indirectly provide Hockett with the facts or circumstances surrounding the Ventura crime.

In sum, the Court finds that Hockett did not obtain his information about the Ventura crimes from Detective Hind. McLain has failed to discharge his burden to show that Hockett falsely testified that McLain admitted committing the Ventura crimes.

3. Conclusion

Implicit in a grant of habeas relief for a prosecutor's knowing use of perjured testimony is the requirement that there be proof of the perjury itself. The claims that Detective Hind provided DeFilipis and Hockett with information about the Ventura crimes -- either by handing them written documents or asking leading questions -- are not credible. McLain has failed to establish that DeFilipis and Hockett committed perjury when they testified at the Ventura trial that McLain admitted to them that he had participated in the crimes.

A. Assuming, Arguendo, that DeFilipis and Hockett Gave Perjurious Testimony at the Ventura Trial, It is Not Reasonably Probable that the Result of the Trial Would Have Been Different

1. The Standard for Assessing Prejudice

A threshold question regarding the use of allegedly perjured testimony is the degree of culpability borne by the prosecution. "[I]f the prosecution knowingly uses perjured testimony, or if the prosecution knowingly fails to disclose that testimony ... was false, the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the verdict." United States v. Endicott, 869 F.2d 452, 455 (9th Cir. 1989). Accord Brown v. Borg, 951 F.2d 1011, 1015 (9th Cir. 1991),

Bagley, 473 U.S. at 678-80. On the other hand, where the false evidence is unknown to the prosecution, the conviction may be set aside "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Endicott, 869 F.2d at 455.

For the reasons discussed in the following sections, the Court finds that there was no deliberate wrongdoing on the part of any member of the prosecution team. The Court also finds that, although not exhaustive, the prosecutor's investigation was sufficient under the standards prevailing in the early 1980's. Therefore, the more stringent standard for testing prejudice applies. McLain has not discharged his burden to show prejudice under this more stringent standard.

2. McLain Has Not Shown that the Prosecution Deliberately Solicited Perjurious Testimony

As explained above, the Court rejects McLain's factual contentions that Detective Hind either inappropriately led Hockett during his questioning or provided DeFilipis with written material other than DeFilipis' own notes.

Moreover, it is undisputed that the prosecutor, Peter Kossoris, never requested that anyone tell anything other than the truth. In fact, DeFilipis and Hockett both confirm that Kossoris requested that they tell the truth and only the truth. Further, throughout the various versions of their respective stories, both Hockett and DeFilipis have acknowledged that they never suggested to Kossoris that the story they were telling was anything other than truthful.

There is no persuasive evidence that any member of the prosecution deliberately solicited perjurious testimony.

3. McLain Has Not Shown that the Prosecution Was Reckless in Confirming the Veracity of the Informants' Testimony

The problems that can arise from the use of informant testimony have long been known to the law. Indeed, the Ninth Circuit recently found that the pitfalls inherent in informant testimony are so obvious that they can be judicially noticed. Bernal-Obeso, 989 F.2d at 333. As described by the Ninth Circuit:

> By definition, criminal informants are cut from untrustworthy cloth and must be managed and carefully watched by the government and the courts to prevent them from falsely accusing the innocent, from manufacturing evidence against those under suspicion of crime, and from lying under oath in the courtroom.... [P] Criminals caught in our system understand they can mitigate their own problems with the law by becoming a witness against someone else. Some of these informants will stop at nothing to maneuver themselves into a position where they have something to sell.

Bernal-Obeso, 989 F.2d at 333, 334.

At the same time, the Circuit recognized that "our criminal justice system could not adequately function without information provided by informants and without their sworn testimony in certain cases." Bernal-Obeso, 989 F.2d at 334. Although explaining the importance of confidential informants to the investigation and prosecution of many types of crimes, id., at 335, the use of jailhouse informants can be equally helpful in prosecuting certain criminals.

The Ninth Circuit panel observed that the judicial system's response has been to rely on four main avenues for protecting the integrity of the judicial process:

> [The courts] have decided on balance, not to prohibit ... the practice of rewarding self-confessed criminals for their cooperation, or to outlaw the testimony in

> court for their testimony. Instead, we have chosen to rely on (1) the integrity of government agents and prosecutors not to introduce untrustworthy evidence into the system, (2) trial judges and stringent discovery rules to subject the process to close scrutiny, (3) defense counsel to test such evidence with vigorous cross examination, and (4) the wisdom of a properly instructed jury whose duty it is to assess each witness's credibility and not to convict unless persuaded beyond a reasonable doubt of the accused's guilt. To quote the Supreme Court, "The established safeguards of the Anglo- American legal system leave the veracity of a witness to be tested by cross- examination, and the credibility of his testimony to be determined by a properly instructed jury."

Bernal-Obeso, 989 F.2d at 335 (citations omitted).

Built upon these premises, the circuit affirmed that "prosecutors and investigators [should] take all reasonable measures to safeguard the system against such treachery." Id., 989 F.2d at 334. Upon a review of all the evidence and testimony, the Court finds that, although not exhaustive, Kossoris' investigation was reasonable under the standards of practice during the early 1980's and by no means reckless.

Unlike the contentions regarding what McLain actually said to the informants, the scope of Kossoris' investigation is not significantly contested. In sum, Kossoris personally interviewed each of the informants before they testified, received and reviewed reports regarding their statements, "evaluated the nature" of the testimony, and met with one or two jurors from the Solano trial who gave their impressions regarding the impact of the informants' testimony. At each of his meetings with Hockett and DeFilipis, Kossoris states that he also evaluated their physical presence and demeanor and attempted to arrive at his own conclusion as to their credibility.

Although McLain points out that Kossoris could have done more, McLain has not demonstrated that Kossoris was reckless in stopping his investigation where he did. Kossoris was not obligated to interview the informants significantly prior to trial. Even though Kossoris did not interview DeFilipis until the first day of DeFilipis' testimony and Hockett until the day before Hockett first testified, Kossoris had not previously committed himself to using their testimony. The timing of the interviews suggests no more than that Kossoris made a prediction that he was likely to use their testimony. An earlier trip to Solano County for the sole purpose of interviewing the informants was unnecessary since they did not provide the foundation for the case, they only helped to seal it.

Moreover, prior to these interviews, Kossoris consulted other sources regarding the reliability of the informants. Even though he did not speak with Detective Hind, Kossoris did speak with Solano County Deputy District Attorney Robin Keeney, who was sufficiently familiar with DeFilipis to consider him "a courthouse fixture" and, because of his position, likely to be generally familiar with the Solano County criminal community. Keeney, of course, had also participated in interviewing DeFilipis. Additionally, Kossoris also received and reviewed the Solano trial transcripts, Detective Hind's report summarizing the DeFilipis and Hockett interviews, and the verbatim transcript of the DeFilipis interview.

Kossoris also met with at least one of the jurors from the Solano trial. The Court does not find this to be a critical part of the investigation since the jurors could only state whether they believed the informants were being truthful, not whether the informants actually were truthful. The problem with informants is not simply that they might lie instead of tell the truth. Rather, the problem is that they are often in a position where they can credibly and convincingly tell a tale that is nothing but a fabrication. Meeting with a juror or other person involved with the previous trial could only help determine whether the

jailhouse informants could weave a credible tale, not whether the tale they told was in fact true. It is the latter point that is crucial here. Nonetheless, the effort is not to be totally discounted.

The Court does not credit Kossoris' evaluation of the likely truth based on his assessment that "all people in jail talk." Such a sweeping generalization is far from the stringent assessment of veracity that is constitutionally required. To conclude that all people talk is to dismiss the possibility that, even though an inmate might talk, some jailhouse informants may nonetheless manufacture claims that the inmate spoke with that particular informant. To rely on this type of conclusion is also to collapse Kossoris' stated two- pronged analysis into one -- since the first will always be satisfied since "everyone talks." The concern about informant veracity is not of recent vintage and the reasonableness of Kossoris' conclusion that McLain spoke should be based on specific facts relating to McLain and the individual informants, not on the sweeping generalization that everyone talks.

Beyond the generalizations, however, Kossoris did make a credibility assessment that was specific to McLain and the particular informants involved. Kossoris explained that he had information that McLain had previously boasted about his role in the 1971 rape of Jodi Whitman and, additionally, had written an autobiography that was seized by prison officials. In light of incidents such as these, Kossoris considered McLain to be a "classic sociopath," highly likely to have discussed his criminal exploits and given details to others with whom he had no previous connection. In light of these factors specific to McLain, Kossoris could reasonably conclude that McLain was likely to have talked with other inmates while incarcerated.

Kossoris could also have reasonably concluded that McLain boasted to these particular inmates. Kossoris explained that he evaluated the likelihood that the informants stories were concocted in light of the fact that

the stories were corroborated by the physical evidence and that the informants each had common and different facts. One of the factors Kossoris relied upon was that DeFilipis, for example, was able to accurately describe locations even though he had never been to Ventura.

That the informants' stories were corroborated by the physical evidence has turned out to be an insufficient benchmark standing by itself. The inadequacy of this standard is proof of the numerous ways in which jailhouse informants have been able to learn information about a case -- such as, for example, by reading newspaper accounts -- even though they had no communication with the defendant.

The other obvious deficiency is that the purpose of the investigation is to determine whether the plausibly accurate story being told by an informant is in fact true. A jailhouse informant who recounts facts that are wholly inconsistent with the physical evidence will be readily uncovered as a fraud and will not be used. The concern, however, is over the veracity of informants who are able to relate facts that are corroborated by the physical evidence.

This factor, however, is not a useless standard so long as it functions only as a guide. More pertinent to the instant case is that it was not an unreasonable guidepost during the early 1980's. In this case, the informants all knew that the victim was a woman, that she was shot three times, that McLain went to Ventura to seek revenge against a former rape victim who testified against him, that McLain and his companions had located and attempted to enter her house, and the common description of the murder victim as "big" or "heavy" and in her early 20's.

Although he did not identify any specifics in his evidentiary hearing testimony, Kossoris also said that he was impressed by the fact that the informants also all knew of different facts -- i.e., they were not simply relating a commonly manufactured story. A review of the record

confirms that Kossoris' statement is accurate. Hockett, for example, knew of the Dodge Charger and that the vehicle had mechanical problems; DeFilipis knew of the car troubles and that the threesome then stole a Volkswagen. Both DeFilipis and Hockett knew that McLain was accompanied by two accomplices, but they remembered the names of different ones -- DeFilipis remembered the name Teddy, that Teddy was McLain's nephew, and that there was someone else; Hockett remembered that one of the boys was named Lloyd. Although these facts were all accurate and, indeed, distinct, according to both Kossoris and Hockett, Kossoris had very little information about the substance of Hockett's anticipated testimony regarding the Ventura killing until after Hockett testified at the Ventura trial.

Since other cellmates did come forward and specifically refute that McLain spoke with anyone, Kossoris might have been more thorough by interviewing other people who shared the cell with McLain to ask them whether McLain ever spoke about his case or whether he had confessed to killing anyone. That he did not do so, however, does not seriously undermine the reasonableness of his other efforts. The only remaining criticisms of any significance are more recent developments in prosecutorial investigative techniques in weeding out untruthful informants.

During the early 1980s, it was typical to rely on such factors as that the information was known only to law enforcement and that the information was corroborated by the physical evidence. Combined with other factors such as the likelihood that McLain actually bragged, the discussions with the Solano district attorney, reviewing reports and transcripts of prior conversations and testimony, although not unimpeachable, given the totality of the circumstances, Kossoris' investigation was certainly reasonable and definitely not reckless.

4. Tested against a Brady Materiality Standard, There is No Reasonable Likelihood that the Outcome would have been Different

In light of the Court's conclusions that the material aspects of DeFilipis' and Hockett's testimony were true, there is little likelihood that any slight variations would have made any difference in the outcome.

III. Third Claim: Jailhouse Informants -- Massiah Violation

In his third claim for relief, McLain asserts that the State interfered with his constitutional right to counsel when he spoke with cellmates who later relayed McLain's statements to the jail authorities. Massiah v. United States, 377 U.S. 201, 205-06 (1964). "[A] defendant does not make out a violation of [the right to counsel] simply by showing that an informant ... reported his incriminating statements to the police." Kuhlmann v. Wilson, 477 U.S. 436, 459 (1986). Rather, "the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." Maine v. Moulton, 474 U.S. 159, 176 (1985) (emphasis added). Thus, in order to establish a violation of the right to counsel, McLain must establish that the informants were actually working as police agents.

A. DeFilipis

The Court finds that DeFilipis' initial contact with investigating officers occurred in the manner described in Detective Hind's tape-recorded interview in February 1980. A verbatim transcript of the interview was received at the evidentiary hearing as Exhibit 318 without any best evidence or hearsay objection. Even if the transcript had

been admitted only for its non-hearsay purposes, in light of DeFilipis' repeated inconsistencies, the Court has sufficient doubt regarding the veracity of DeFilipis' current version such that the current story cannot be said to have been established by the requisite preponderance of the evidence. Sumner v. Mata, 449 U.S. 539, 551 (1981), McKenzie v. McCormick, 27 F.3d 1415, 1419 (9th Cir. 1994).

Specifically, the Court finds that DeFilipis' handwritten notes were found by a guard during a routine entry search and that, when DeFilipis explained what they were, on DeFilipis' request the guard placed the note paper with DeFilipis' stored property to keep the notes safe and to protect DeFilipis' safety should another inmate find the papers. Partially out of fear of McLain, DeFilipis then requested to speak with the investigating detective.

The Court further finds that, at DeFilipis' request, the guard placed a phone call to Detective Hind at his residence. Prior to receiving the phone call, Detective Hind had never heard of Edward DeFilipis. Hind spoke only briefly with DeFilipis to schedule an appointment for the following day. Hind met with DeFilipis on February 5, 1980 (several days after DeFilipis' conversations with McLain), received information from DeFilipis, and specifically told DeFilipis not to seek out further information. DeFilipis was released within three hours of this conversation.

DeFilipis' recent claim that the guard threatened to transfer DeFilipis to a dangerous portion of the jail where racial tensions were high, especially considering the source (DeFilipis), is simply not credible.

Based on these findings, there is no basis for finding a connection between law enforcement officers and Edward DeFilipis. Prior to his meeting with Hind, DeFilipis had no contact with law enforcement as a potential agent. At the meeting on February 5, 1980, DeFilipis was specifically told not to investigate further. Cf. United States v. Henry, 447 U.S. 264 (1980), Moulton,

474 U.S. 159. The Court does not find these instructions dispositive, but rather finds that DeFilipis was released in such a short period of time that he had no opportunity to conduct any sort of investigation. In short, DeFilipis was not acting as a police officer. McLain was not deprived of his right to counsel when speaking with a fellow inmate who was nothing other than an incarcerated private citizen.

B. Hockett

McLain has failed to persuasively demonstrate any connection between law enforcement and Hockett. Hockett states that he believed his assistance was sought by law enforcement because Doyle Smith said that he, Smith, was working in connection with Hind to build a case against McLain. In essence, Hockett says Smith said that Hind said that Smith could work with the investigative team in order to shore up the case against McLain.

The Court concludes that, if each of the nested statements were true, the law enforcement connection would be sufficient as a matter of law. The Attorney General did not object to Hockett's testimony as hearsay. Irrespective of the Court's power to exclude this evidence sua sponte, the Court does not find this testimony sufficiently reliable or credible. The multiple levels of hearsay undermine the reliability of the ultimate allegation at issue -- whether Hind and Smith worked out an official arrangement such that Smith was empowered to enlist Hockett in his investigative efforts. The reliability of Hockett's testimony is also belied by the minimal amount of information that is within his personal knowledge. McLain has not presented any specific facts establishing Smith's alleged law enforcement connection; he has only offered Hockett's general conclusionary opinion that Smith was part of the investigative team. "Petitioner must convince the district court 'by a preponderance of evidence' of the facts underlying the alleged constitutional

error." McKenzie, 27 F.3d at 1419, quoting Johnson v. Zerbst, 304 U.S. 458, 469 (1938). Accord Mata, 449 U.S. at 551. Hockett's testimony of what Smith said Hind said does not satisfy that burden in this case.

C. Conclusion

The Court finds no credible evidence connecting either of the jailhouse informants with law enforcement authorities at the time of the informants' conversations with McLain. Absent a law enforcement connection, the Sixth Amendment claim fails. Kuhlmann, 477 U.S. at 459.

IV. Fourth Claim: Jailhouse Informants -- Brady Violation

"[T]he prosecutor's withholding of evidence favorable to the accused violates due process where the evidence is material either to guilt or innocence. Favorable evidence includes impeachment evidence." United States v. Brumel-Alvarez, 991 F.2d 1452, 1461 (9th Cir. 1992) (citation omitted).

> To prove a Brady violation the defendant must show failure to disclose material evidence. Evidence is material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."

Brumel-Alvarez, 991 F.2d at 1461, quoting Bagley, 473 U.S. at 682.

As already explained in the context of Claim II, McLain's assertion that the prosecution failed to disclose that Hind provided the jailhouse informants with their information is unfounded. The jailhouse informants obtained their information from McLain. There was nothing more in this regard for the prosecutor to disclose.

The Attorney General does not dispute that Detective Hind had promised to assist DeFilipis and Hockett locate jobs upon being released and that Kossoris failed to inform defense counsel of these promises.

Although this information probably should have been disclosed to the defense or brought out during trial, in this case the information was ultimately not material.

The jailhouse informants received much more substantial benefits that were significantly more tangible. DeFilipis, for example, walked out of jail barely 3 hours after speaking with Detective Hind and Deputy District Attorney Keeney. He also acknowledged that he had access to newspaper clippings that McLain kept regarding the Ventura crimes and that he had served as an informant many times before (possibly as many as 300 times). Pell even introduced a stipulation between himself and Kossoris that DeFilipis' own mother would testify that she would not believe a word he said because he is an incorrigible liar and has a horrible reputation for being truthful.

The jurors learned that Hockett had an upcoming probation revocation hearing and that Kossoris had promised to write a letter describing Hockett's cooperation and would request leniency on Hockett's behalf. More substantially, Pell secured Hockett's admission that, in defense to his prior charges, Hockett had feigned mental illness, including claims of auditory and visual hallucinations and amnesia, to which Hockett falsely testified in court. Hockett explained that while he had been willing to lie about his own mental state, he was not willing to lie about McLain's statements even though he had struck a deal in exchange for favorable testimony. It was up to the jury to assess the credibility of this assertion.

The jurors may well have credited both Hockett's and DeFilipis' testimony. Any of the jurors, however, that credited the informants' testimony after Pell's cross-examination would not likely have been influenced to discredit these informants upon learning that Hind had also promised to assist them in finding a job upon being released.

Furthermore, and equally important, as noted above, the jailhouse informants were simply not the linchpin to the prosecution's case. Kosscris certainly capitalized on the informants' testimony throughout his closing argument -- often using their testimony as the glue that held together various strands. (32 R.T. 7853-79; 32 R.T. 7867-73.) Kossoris, in fact, spent more time bolstering the informants' credibility than he spent attacking McLain's "incredible and unbelievable" story. (32 R.T. 7867-73, 7885-90.) Kossoris also used the informants' testimony to prove McLain's role as a principal, which was important for establishing death eligibility. But, notwithstanding Kossoris' significant reliance on the informant testimony, the information not disclosed to defense counsel simply cannot be found to be material. There is virtually no likelihood that "competent counsel would have made a different result reasonably probable," Kyles v. Whitley, 115 S. Ct. 1555, 1569 (1995), simply by being able to additionally exploit evidence regarding the informants' future job prospects.

V. Fifth Claim: Jailhouse Informants -- New Evidence

McLain reasserts the oft-repeated observation that "death" is "different." Gardner v. Florida, 430 U.S. 349, 357 (1977) (plurality), Beck v. Alabama, 447 U.S. 625, 637 (1980), Harmelin v. Michigan, 501 U.S. 957, 994 (1991). Related to this, the Supreme Court has frequently affirmed that "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment." Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality), Johnson v. Mississippi, 486 U.S. 578, 590 (1988). Although the Court has found this principle applicable to the guilt phase of capital trials as well as sentencing, Beck, 447 U.S. at 638, the circumstances have been far different from those in the present case.

The unreliability asserted in this case is premised upon the possibility that the informants' testimony at trial was untrue or, at least as to these informants, not sufficiently reliable. What McLain essentially challenges is Hockett's and DeFilipis' credibility. While implicitly acknowledging that credibility determinations are to be left to the jurors, McLain seeks to have these two informants declared either incredible as a matter of law or at least not sufficiently credible that the jury should not have been allowed to rely on their testimony.

McLain, however, fails to present anything "new" as to the informants' credibility. The reasons for the informants' claimed unreliability were fully developed at the state trial. Pell thoroughly cross-examined Hockett and DeFilipis as to the circumstances of their conversations with McLain, strongly challenged their veracity, and highlighted their motivations to fabricate testimony against McLain for their own benefit. The purportedly "new" evidence is that these informants have now recanted and re-recanted their stories. But this scenario was plainly foreseeable to the trial jury. Although the events that have transpired in the last 15 years -- and particularly in the last three -- are events which could not have been known to the jury prior to their having occurred, the circumstances surrounding the jailhouse conversations were sufficiently presented to the jury. The jury was entitled to evaluate the credibility of the witnesses and determine the likelihood that these witnesses' biases or propensity for falsehoods may have affected the credibility of their testimony.

VI. Sixth Claim: Exclusion of Accomplice Histories

The sixth claim for relief asserts that because the trial court excluded evidence relating to the credibility and psychological condition of McLain's two accomplices, his conviction and death sentence have been unlawfully and

unconstitutionally imposed in violation of the Sixth, Eighth, and Fourteenth Amendments.

The trial court excluded evidence of Willis' previous attack on a child and prohibited cross-examination on, and the admission of evidence concerning, Ketcherside's prior attacks on adolescent women, his mental defects, and his commitment to a mental hospital. Additionally, the trial court rejected a defense request that a psychiatric examination of Ketcherside be conducted and denied discovery that would have led to disclosures affecting Ketcherside's credibility and competency.

Petitioner alleges that the exclusion of this evidence violated his rights under the Sixth and Fourteenth Amendments to confront and cross-examine the witnesses against him. He asserts that these are facts from which bias, prejudice or lack of credibility might be inferred. Specifically, he argues that evidence of Ketcherside's prior attacks on young women would have served to impeach Ketcherside's testimony that he was a mere bystander in the Kelley incident. He further argues that the prior attacks were relevant to show bias. He also asserts that the fact that these prior attacks could have been used to enhance any sentence that Ketcherside could have gotten from the Kelley incident might have increased his incentive to lie and implicate petitioner so that he could receive immunity. Petitioner argues that this potential impeachment was crucial because Ketcherside provided the only direct evidence that petitioner was involved in the Kelley murder.

Petitioner contends that the evidence of prior attacks by Willis and Ketcherside was also relevant to his defense that Ketcherside and Willis had committed the murder. He argues that the fact that they had previously committed assaults was crucial to prove that they had the ability to conceive of such a plan on their own. Thus, he asserts the guilt phase was tainted by the exclusion of the evidence.

He argues that the penalty phase also was tainted by the exclusion of evidence of Willis' attack on a child and Ketcherside's attacks on females. This prevented the defense from attacking the State's picture of McLain as having led two young innocents astray. It allowed the State to argue that McLain was the ringleader.

Petitioner argues that the evidence sought to be introduced fell within the exceptions set forth in California Evidence Code s 1101. In general, section 1101 prohibits evidence of character to prove conduct on a specific occasion. The section does not, however, prohibit evidence that a person committed a crime when relevant to prove some fact other than his disposition to commit such acts. Nor does section 1101 affect the admissibility of character evidence to attack credibility. Petitioner asserts that the evidence of the prior attacks by Ketcherside was not offered not to prove that Ketcherside committed the Kelley murder, but to discredit Ketcherside's testimony and rebut the State's portrayal of McLain as leading two young innocents astray.

McLain argues that the admission of evidence concerning his prior rape convictions compounded the prejudice flowing from the erroneous exclusion of the evidence of Ketcherside's and Willis' histories of violent attacks on women. The trial court allowed admission of evidence of the petitioner's prior sexual assaults against Jodi Whitman and Lisa Donaldson. McLain argues that this led the jury to view Ketcherside and Willis as relatively innocent and passive in comparison to McLain.

Petitioner also requested a psychiatric examination of Ketcherside to determine whether he was competent to testify. Petitioner argues that the trial court erroneously denied this examination given that it was reasonably accessible, would have produced relevant evidence, and was of central importance to an intelligent defense in this trial.

The State asserts that at no time during the guilt phase did McLain attempt to introduce evidence of Willis' unadjudicated juvenile allegations of child molestation.

The State further argues that there is no constitutional authority that holds that a state criminal defendant is entitled to psychiatric examination of a prosecution witness. Similarly, no constitutional authority entitles the defendant to admission of prior unadjudicated juvenile allegations of either a prosecution witness or an accomplice to prove innocence or demonstrate remorse at the penalty phase.

A. Guilt Phase

The Sixth Amendment, as made applicable to the States by the Fourteenth Amendment, guarantees a criminal defendant the right to confront witnesses against him. Davis v. Alaska, 94 S. Ct. 1105, 1110 (1974). "'[A] primary interest secured by it is the right of cross-examination.'" Id. (quoting Douglas v. Alabama, 85 S. Ct. 1074, 1076 (1965)). "'[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.'" Id. (quoting Greene v. McElroy, 79 S. Ct. 1400, 1413 (1959) (evidence that prosecution's main witness was on probation should have been admitted as evidence of bias)).

"[A] limitation on a cross-examination which prevents a person charged with a crime from placing before the jury facts from which bias, prejudice or lack of credibility of a prosecuting witness might be inferred constitutes denial of the right of confrontation guaranteed by the Sixth Amendment." United States v. Garrett, 542 F.2d 23, 25 (6th Cir. 1976) (citing Davis, 94 S. Ct. 1105).

"[T]he focus of the prejudice inquiry in determining whether the confrontation right has been violated must be on the particular witness, not on the outcome of the entire trial." Delaware v. Van Arsdall, 106 S. Ct. 1431, 1435

(1986). The inquiry to be made is whether "'[a] reasonable jury might have received a significantly different impression of [the witness'] credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination.'" Olden v. Kentucky, 109 S. Ct. 480 (1988), quoting Van Arsdall, 106 S.Ct at 1436.

However, the denial of the right to confront witnesses is not per se error requiring automatic reversal. It may be harmless. Van Arsdall, 106 S. Ct. at 1437 (1986). On direct appeal, if it is found that the Confrontation Clause has been violated, reversal is required unless the reviewing court can conclude that the error was harmless beyond a reasonable doubt. Van Arsdall, 106 S.Ct at 1438. However, a higher standard for prejudice applies during collateral review. Brecht v. Abrahamson, 113 S.Ct 1710, 1722 (1993).

In the context of a habeas attack, the deprivation of a constitutional right does not justify habeas relief unless the error "'had substantial and injurious effect or influence in determining the jury's verdict.'" Brecht, 113 S. Ct. at 1722, quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946). "Under this standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish 'actual prejudice.'" Brecht, 113 S. Ct. at 1722. However, "when a habeas court is in grave doubt as to the harmlessness of an error that affects substantial rights, it should grant relief." O'Neil v. McAninch, 115 S. Ct. 992, 998 (1995).

Brecht only applies to "trial error."

Trial error "occur[s] during the presentation of the case to the jury," and is amenable to harmless-error analysis because it "may ... be quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on the trial]." At the other end of the spectrum of constitutional errors lie "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error'

> standards." The existence of such defects -- deprivation of the right to counsel, for example -- requires automatic reversal of the conviction because they infect the entire trial process.

Brecht, 113 S. Ct. at 1717 (quoting Arizona v. Fulminante, 111 S. Ct. 1246, 1249, 1254 (1991)).

The denial of a defendant's opportunity to impeach a witness in violation of the Confrontation Clause constitutes "trial error." See Van Arsdall, 106 S. Ct. at 1438.

There are three basic types of evidence Petitioner argues should have been admitted: (1) evidence of Willis' prior attack on a child; (2) evidence of Ketcherside's prior attacks on females; and (3) evidence of Ketcherside's mental defects and hospitalization, including evidence from a psychiatric exam.

McLain fails to explain how excluding the evidence relating to Willis violated his constitutional rights in the guilt phase. Willis did not testify. Therefore, McLain had no right to confront him. There was no violation of the Confrontation Clause by the exclusion of this evidence.

Nor were McLain's rights under the Confrontation Clause violated by the trial court's exclusion of evidence of Ketcherside's prior bad acts. To the extent it was at all relevant to credibility, a reasonable jury would not have received a significantly different impression of Ketcherside's credibility if the evidence had been admitted. Defense counsel thoroughly cross-examined Ketcherside. Pell attacked Ketcherside's credibility by, for example, casting doubt on Ketcherside's story that he was at the beach at the time of the Kelley murder, bringing out Ketcherside's different stories regarding the theft of the Dodge Charger, and reading to the jury Ketcherside's prior inconsistent statements describing the events at Whitman's apartment. Even the prosecutor told the jury to assume that Ketcherside was lying about his innocence of the Kelley murder.

Defense counsel sought to impeach Ketcherside's statement that he remained at the beach. Even though McLain was prevented from using Ketcherside's prior bad acts to do this, the prosecutor did as much in his closing argument. He stated that it would be reasonable for the jury to disbelieve Ketcherside's testimony about his limited role. (R.T. 7858.) In fact, the prosecutor told the jury to assume Ketcherside was an accomplice. (R.T. 7845.) The prosecutor also admitted that Ketcherside was not an "angel" and was less than honest. (R.T. 7857.) Thus, a reasonable jury would not have received a significantly different impression of Ketcherside's credibility if the evidence had been admitted.

Excluding this evidence may have affected McLain's ability to present his defend on the basis that Willis and Ketcherside, acting independently of McLain, murdered Kelley. The defense was not able to inform the jury that the persons being accused had violent propensities. But this would have been an impermissible use of prior bad acts evidence under California Evidence Code § 1101 because the defense could not use evidence of Ketcherside's and Willis' prior bad acts to prove they had a propensity to assault women and, therefore, probably assaulted Kelley. Furthermore, the prior assaults were so factually dissimilar to the Kelley crime that they had very little, if any, probative value as to who murdered Kelley. The exclusion of the evidence did not render the trial fundamentally unfair and thus did not violate McLain's constitutional rights.

Finally, Petitioner asserts he should have been allowed to conduct a psychiatric examination concerning Ketcherside's ability to tell the truth and been able to present evidence of Ketcherside's mental defects. Opinion testimony of a witness' ability to tell the truth is generally inadmissible under the California law. Cal.Evid.Code § 805, People v. Cooks, 141 Cal. App. 3d 224, 302, 190 Cal. Rptr. 211 (1983), cert. denied, 464 U.S. 1076 (1984). As discussed above, the evidence that was admitted was

sufficient to attack Ketcherside's credibility. Therefore, the exclusion of this evidence did not violate the Confrontation Clause. Moreover, jurors are the ones assigned to measure the credibility of witnesses. The denial of a psychiatric examination of the truthfulness of Ketcherside was not fundamentally unfair.

Even if the exclusion of the evidence concerning Ketcherside violated the Confrontation Clause, it is clear that the exclusion of the evidence did not have a "substantial and injurious effect" on the determination of the jury's verdict and therefore does not entitle McLain to habeas relief. Any additional evidence to impeach Ketcherside would have had a minimal effect, if any, on the verdict. Evidence to prove Ketcherside and Willis were capable of committing the Kelley murder on their own would also have had a minimal effect, if any, on the determination of the jury's verdict given the large amount of evidence that supported the conclusion that Petitioner was involved in the Kelley offense.

B. Penalty Phase

McLain complains that the exclusion of this evidence enabled the State to argue that the fact that McLain led astray two young and innocent juveniles was an aggravating factor. McLain contends that he should have been allowed to rebut this argument with evidence that Willis and Ketcherside were not innocent and were fully capable of violent acts prior to meeting McLain.

The Eighth and Fourteenth Amendments require that the sentencer "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett, 438 U.S. at 604 (plurality).

McLain's argument fails because the State never claimed that Ketcherside and Willis were innocent youths.

On the contrary, Kossoris candidly acknowledged that they were not. (R.T. 8820.)

The Court therefore denies the petitioner's sixth claim for relief.

VII. Seventh Claim: Exclusion of Collusion Evidence

Petitioner's seventh claim for relief asserts that, because the trial court excluded statements made by Willis indicating collusion between him and Ketcherside against McLain, his conviction and death sentence were unlawfully imposed in violation of the Sixth, Eighth, and Fourteenth Amendments.

According to Petitioner, Willis told a cell-mate, J.S. Williams, that he and Ketcherside had attempted to "get the story together" and "put it on" McLain. The prosecution successfully excluded this evidence through a motion in limine "to Exclude Inadmissible Hearsay Statements by Theodore Willis."

Petitioner asserts that the trial court excluded Williams' testimony on the grounds that it was hearsay that did not qualify as a statement against penal interest. He also asserts that the trial court excluded the testimony of Dennis Morrison that Willis stated that he and Ketcherside were attempting to put a story together to blame McLain for the homicides.

Petitioner asserts that this evidence was important at both the guilt and the penalty phases because it supported the defense that Ketcherside and Willis committed the murder and was, therefore, mitigating. He asserts that the exclusion of the evidence violated his rights to due process and to confront witnesses against him.

The trial court did not exclude evidence of collusion as inadmissible hearsay. Rather, the trial court's "preliminary view" was that the statements were hearsay not within any exception. Later, however, the trial court recognized that the statements concerning an intent to blame the crime on the petitioner were arguably

admissible. But the trial court also observed that such evidence would raise the question of what crime Ketcherside and Willis were attempting to pin on petitioner and would entitle the prosecutor to attempt to prove that it was the Solano County murder. The trial court had previously granted a defense motion to exclude evidence of the Solano crimes.

The testimony of Dennis Morrison was discussed on the record. (R.T. 7456.) The trial court indicated that it did not believe any statement made by Willis to Morrison to the effect that he was attempting to place the blame for a crime on the petitioner was a statement against penal interest. Alternatively, the trial court noted that even if it let in Morrison's testimony, it would then let in evidence of the murder in Solano County to allow the prosecution to prove that the crime referred to by Willis was the Solano County murder, not the Ventura County one. Once the trial court expressed these views, defense counsel never offered Morrison's testimony.

The testimony of J.S. Williams was discussed several times. The petitioner offered testimony by Williams concerning: (1) statements by Willis to Williams wherein Willis admitted shooting the victim; (2) observations of Willis passing notes to Ketcherside and what Willis said the notes were; and (3) statements by Willis that he and Ketcherside were blaming a crime on McLain. The trial court ruled that the first category of testimony was admissible as a statement against penal interest. The second was only admissible as far as observations made by Williams, not anything said by Willis. The third was not admissible as it was not a statement against penal interest. (R.T. 7445-56.) However, the trial court also determined that to the extent the first category of testimony was admitted, the prosecution could explore who else was involved in the murder. If the prosecution chose to go into that area of evidence, then the testimony concerning Willis' statements that he was trying to blame the crime on the petitioner would be admissible. But the statements

by Willis that he was attempting to place the blame on McLain would open the door for the prosecution to argue that the crime referred to by Willis was the Solano County murder, not the murder of Kelley.

The defense did not offer any testimony by Williams -- not even the testimony that the trial court determined was admissible.

The State argues that defense counsel made a tactical decision not to elicit the evidence of the collusion, or alternatively, that this ruling does not present a federal question.

Federal courts will not disturb state court evidentiary rulings on habeas corpus review unless the rulings violated fundamental due process and the right to a fair trial. Jammal v. Van de Camp, 926 F.2d 918, 919 (9th Cir. 1991). "[F]ailure to comply with the state's rules of evidence is neither a necessary nor a sufficient basis for granting habeas relief." Id.

However, habeas relief will lie if the evidentiary ruling violated the Confrontation Clause and had a substantial and injurious effect or influence in determining the jury's verdict. Van Arsdall, 106 S. Ct. 1431, Brecht, 113 S. Ct. at 1722.

There is little question but that defense counsel made a tactical choice not to offer Morrison's and Williams' testimony for fear that it could open the door to the Solano County murder which had been successfully excluded from the trial. In a similar instance involving blood evidence on Ketcherside's trousers, defense counsel did not introduce the evidence after being informed by the trial court that the prosecution would be allowed to argue the blood on the trousers came from the Solano County murder, not the Kelley murder.

Even if the petitioner's trial attorney did not make a tactical choice to omit this evidence and the trial court erroneously excluded it, its exclusion did not render the trial fundamentally unfair or violate the Confrontation Clause so as to justify habeas relief.

Willis did not testify. Thus, any evidence that he and Ketcherside collaborated on their stories would not be relevant to judging his credibility or for weighing the significance of any similarities between their stories.

The statement that Willis and Ketcherside were blaming a crime on McLain might be probative of Ketcherside's credibility and in judging McLain's testimony that he was not involved in Kelley's murder. However, the record is unclear as to which crime Willis was referring. It could have been the Ventura County Kelley murder. It could have been the Solano County Bazargani murder. Or breaking into Whitman's apartment, or stealing the Dodge Charger, or some other crime. The trial court brought this uncertainty to Pell's attention. Pell did not seek to clarify the record. Without the clarification, Pell failed to prove the probative value of the evidence offered.

Furthermore, Ketcherside's credibility was seriously shattered both by defense cross-examination as well as by the prosecutor himself. As a result, the additional evidence addressed in the instant claim would not have caused a reasonable jury to have a significantly different impression of Ketcherside.

The Court therefore denies Petitioner's seventh claim for relief.

VIII. Eighth Claim: Unreliability of Informant Testimony Instruction

Petitioner's eighth claim for relief complains that his conviction and death sentence were unlawfully imposed in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments because the trial court failed to instruct the jury that informant testimony must be examined with greater care than the testimony of ordinary witnesses.

Petitioner asserts that the only live testimony implicating the petitioner was from an immunized accomplice and two jailhouse informants. He argues that, in a death penalty case, the trial court must admonish the

jury to examine testimony of an informant with greater care. He concludes that the failure of the court to give such an instruction sua sponte is unconstitutional.

Federal courts have required a separate instruction directing juries to carefully examine informant testimony. On Lee v. United States, 72 S. Ct. 967 (1952), Guam v. Dela Rosa, 644 F.2d 1257 (9th Cir. 1980). Such an instruction, however, is not constitutionally required. In the present case, the lack of an instruction on the unreliability of informant testimony did not render Petitioner's trial fundamentally unfair in violation of the right to due process.

The majority of the informant testimony related to admissions and confessions by McLain. The jury was instructed to be careful of evidence of admissions or confessions by McLain. (C.T. 1865, 1869.) Specifically, the trial court instructed the jury that "[e]vidence of an oral confession or oral admission of the defendant should be viewed with caution." (C.T. 1865, R.T. 7978; see also C.T. 1866, R.T. 7979 ("oral admission" only).) The trial court further instructed the jury: "No person may be convicted ... unless there is some proof of each element of the crime independent of any confession or admission made by him outside of this trial." (C.T. 1869, R.T. 7979-80.)

Additionally, the jury was given a detailed instruction on judging the credibility of witnesses. The instruction advised the jury that it "may consider any thing that has a tendency in reason to prove or disprove the truthfulness of [one's] testimony ...." (C.T. 1854.) The instruction allowed the jury to consider, among other things, a witness' "character for honesty or truthfulness or their opposites" and "[t]he existence or nonexistence of a bias, interest, or other motive." (C.T. 1854.) Finally, the jury was instructed that before it accepted the testimony of a single witness as the sole proof of any fact to be proved by the prosecution, it must "carefully review all the testimony upon which the proof of such fact depends." (C.T. 1860.)

Thus, while the trial court did not expressly tell the jury that it must be careful in examining informant testimony, the trial court gave the jury sufficient guidance on its duty to carefully examine all testimony and, in particular, evidence of admissions by McLain. The guidance specifically referred to the types of bias potentially possessed by the informants and brought to the attention of the jury on both direct examination and on cross- examination.

Additionally, there was significant evidence presented from which the jury could infer the informants' bias and motivation to fabricate.

Finally, there was extensive argument to the jury that the informant testimony should be doubted. Thus, the failure to give a separate instruction on the unreliability of informant testimony did not render the trial fundamentally unfair.

The failure of the trial court to give a special instruction for informant testimony did not render petitioner's guilt conviction or death sentence arbitrary or capricious and thus did not violate the Eighth Amendment. The instructions that were given provided adequate safeguards to ensure that the jury's determination was fair.

The Court therefore denies McLain's eighth claim for relief.

IX. Ninth Claim: Accomplice Instruction

Petitioner's ninth claim for relief asserts that his conviction and death sentence were unlawfully imposed in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments because the trial court failed to instruct the jury that Ketcherside was an accomplice as a matter of law.

California Penal Code § 1111 defines an accomplice as a person "who is liable to prosecution for the identical offense charged against the defendant on trial in the cause

in which the testimony of the accomplice is given." That definition encompasses aiders and abettors. Petitioner argues that Ketcherside's own testimony established that he was an accomplice as a matter of law.

The trial court instructed the jury that, with respect to the Whitman charges, if the jury found that those offenses were committed by anyone, the jury had to find that Ketcherside was an accomplice as a matter of law. With respect to the Kelley murder charges, however, the trial court did not instruct the jury that Ketcherside was an accomplice as a matter of law.

Petitioner argues that the failure to instruct the jury that Ketcherside was an accomplice as a matter of law with respect to the Kelley offenses prejudiced both the guilt and penalty determinations. Petitioner asserts that it effectively relieved Ketcherside of criminal culpability with respect to the Kelley offenses, especially when considered in conjunction with the accomplice instruction relating to the Whitman charges. Petitioner contends that since there was no dispute that Kelley was murdered and the court effectively instructed the jury that Ketcherside was not involved, the jury was led to find Petitioner guilty of the Kelley charges.

The Court properly refused to instruct the jury that Ketcherside was an accomplice as a matter of law to the Kelley charges. Under California law, whether a person is an accomplice is a question of fact for the jury unless there is no dispute as to either the facts or the inferences to be drawn from them. McLain, 46 Cal.3d at 106. Ketcherside admitted participating in the acts underlying the Whitman charges and there was no evidence to the contrary. However, there was evidence from which the jury could have concluded that Ketcherside was not an accomplice to the Kelley crimes.

Contrary to McLain's argument, the trial court's failure to instruct the jury that Ketcherside was an accomplice as a matter of law was not the equivalent of instructing the jury that Ketcherside was not involved and

was not an accomplice. The trial court's failure to instruct left for the jury the question whether Ketcherside was an accomplice. The jury was free to determine that he was an accomplice. In fact, in closing argument, the prosecutor told the jury to assume Ketcherside was an accomplice in the Kelley crimes. (R.T. 7845.)

Thus, the trial court's failure to instruct that Ketcherside was an accomplice as a matter of law was not erroneous. It neither tainted the trial nor rendered it fundamentally unfair. The absence of the instruction did not render the death sentence arbitrary or capricious. There was no constitutional violation.

The Court therefore denies Petitioner's ninth claim for relief.

X. Tenth Claim: District Attorney Recusal

McLain's tenth claim for relief asserts that Kossoris' participation as the prosecutor denied him a fair trial and due process of law because Kossoris harbored "extreme personal prejudice" against McLain and because defense counsel expressed an "intent to call Mr. Kossoris as a material witness." (3d Am.Ptn., P 41, p.33.)

McLain claims that the State deprived him of an important witness in his defense and deprived him of his due process right to an impartial and disinterested prosecutor when the trial judge denied his motion to have Kossoris and the entire Ventura County District Attorney's Office recused from the prosecution.

Contrary to McLain's contention, the trial court did not overlook the evidence of Kossoris' alleged personal bias, but rather found in a separate, unreported hearing that the showing was not substantial. McLain has failed to show that Kossoris had a personal interest, financial or otherwise, in the prosecution of the case that was significantly different from the ordinary interest that society has in bringing those charged with a crime to

justice. As to the claim that the State deprived him of an important witness, McLain has failed to identify any evidence that was material to his defense, let alone evidence that he had a "compelling need" to present through the testimony of Kossoris. More importantly, the trial court did not preclude McLain from calling Kossoris as a witness nor did it act improperly by requiring an offer of proof before Kossoris would be forced to take the stand. Moreover, since Kossoris was not called as a witness, the typical advocate-witness considerations did not arise. Thus, the trial court's refusal to disqualify Kossoris on the basis of Kossoris' status as a potential witness did not interfere with McLain's ability to present a defense.

A. The Claims Raise Federal Constitutional Errors and are Cognizable on Federal Habeas Corpus

McLain does not complain about an alleged violation of California Penal Code § 1424 -- the procedural mechanism by which a motion to recuse the district attorney is brought. Rather, he claims that his underlying constitutional rights -- brought to the court via the § 1424 motion -- were violated. These are questions of federal constitutional law.

If McLain was denied the right to present material evidence in his defense -- here, allegedly, Kossoris' testimony -- McLain would be entitled to relief under the Fifth Amendment due process clause and the Sixth Amendment rights of confrontation and compulsory process. Davis, 415 U.S. at 316-18, United States v. Prantil, 764 F.2d 548, 552 (9th Cir. 1985). If, on the other hand, Kossoris was allowed to give unsworn testimony through his participation as an advocate, under certain circumstances, McLain would be able to state a claim for denial of his right to confront and cross-examine witness. Prantil, 764 F.2d at 552. Alternatively, if Kossoris was allowed both to testify and to serve as the prosecutor, the situation could well raise "a matter of institutional concern

implicating the basic foundations of our system of justice," remediable through the due process clause depending, of course, on the nature of the testimony. Prantil, 764 F.2d at 553.

As to McLain's claims of prosecutorial bias, the Supreme Court has clearly recognized that the due process clause imposes definite "limits on the partisanship of ... prosecutors" and that the presence of a personal interest in the outcome of a prosecution "may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." Marshall v. Jerrico, Inc., 446 U.S. 238, 249-50 (1980).

While the allegations and evidence are ultimately insufficient to warrant relief, the claims nonetheless raise issues implicating constitutional rights. The claims are not premised on pure violations of state law; the claims allege violations of the federal constitution. The Court must review the claims on their merits to determine whether these constitutional guarantees were in fact respected.

B. The Advocate-Witness Claims

"Federal courts have condemned the practice of a government prosecutor testifying at a trial in which he is participating as counsel." United States v. Marcello, 731 F.2d 1354, 1358-59 (9th Cir. 1984). Accord Prantil, 764 F.2d 548, 551-54 (9th Cir. 1985.) Yet, "this practice is not of concern in the instant case where the prosecutors were not called to testify." Marcello, 731 F.2d at 1359.

McLain's claims, therefore, must be analyzed in terms of Kossoris' absence from the witness stand, not on his alleged presence there.

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1. The Trial Court Did Not Preclude McLain from Calling Kossoris as a Witness

McLain asserts some sort of constitutional error based on Kossoris' status as a potential witness. The precise nature of the claim is unclear.

The petition itself does not allege that Kossoris was a material witness. Instead, the contention is that recusal was mandated because the defense attorney had declared an "intent to call [the prosecutor] as a material witness." (3d Am.Ptn., P 41, 33:26-27.) Standing alone, this bare allegation is plainly insufficient to warrant relief. On the face of the petition itself, McLain fails to suggest that Kossoris personally knew any material information that would have rendered the defense's declared "intent" anything other than frivolous. Cf. Rule 2(c), Rules Governing § 2254 Cases. If there is no evidence to which the prosecutor might properly testify, there is no error in denying the recusal motion based on the prosecutor's alleged status as a "potential witness." Cf. United States v. Valenzuela-Bernal, 458 U.S. 858 (1982).

Indulging in the most generous reading possible in light of the supporting legal argument, McLain seems to be arguing that Kossoris was in fact a material witness and that McLain was deprived of his right to compulsory process when the trial court prohibited him from calling Kossoris as a witness at trial. These arguments misread the trial court record.

The trial court did not bar McLain from calling Kossoris. Rather, the trial court did no more than express skepticism about the admissibility and materiality of any potential testimony from Kossoris. The trial court quite clearly explained, however, that it was not precluding McLain from calling Kossoris. It ruled only that McLain would have to tender an offer of proof as to what McLain intended to elicit from Kossoris before he would be allowed to call Kossoris as a witness. (1 R.T. 115:16-22.)

Both the state and federal courts concur that the proponent of an item of evidence has the burden to establish its admissibility. Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 174 (1988), id. at 177 (Rehnquist, J., concurring and dissenting), People v. Adams, 149 Cal. App. 3d 1190, 1194, 197 Cal. Rptr. 623 (1983), cf. Warner Constr. Corp. v. Los Angeles, 2 Cal.3d 285, 298 n.14, 85 Cal. Rptr. 444 (1970). The trial court was rightly skeptical of the relevance of any testimony that might be provided by Kossoris. As such, the trial judge required an offer of proof. In the offer of proof tendered with the motion to recuse, the showing was manifestly insufficient as explained in the following section. McLain never called Kossoris to the stand nor attempted to make a further offer of proof. Kossoris' absence from the witness stand was the result of McLain's failure to press the issue and the lack of relevant testimony available from Kossoris, not the trial court's ruling on the recusal motion.

2. Irrespective of the Trial Court's Ruling, McLain Makes No Showing that Kossoris had any Relevant, Material Evidence to Offer as a Witness

It is the jury's prerogative to assess the value of testimony; it is the trial judge's duty to assure that the testimony is relevant and admissible. Although the trial court may not intrude into the jury's province of evaluating the exculpatory value of proffered testimony, it is the trial court's responsibility to rule on the basic admissibility of testimony. Prantil, 764 F.2d at 554. Here, McLain failed to make any showing to the trial court, and again makes no showing here that any of the proposed testimony from Kossoris would have been relevant to any issue at trial. Moreover, he also fails to establish that this evidence was not available from alternative sources.

"Recognizing the possibility for abuse," the Ninth Circuit has erected a high threshold before criminal

defendants will be permitted to force the disqualification of a participating prosecutor by designating them as witnesses. Prantil, 764 F.2d at 554. As a preliminary matter, "a defendant must demonstrate a 'compelling need' before a participating prosecutor will be permitted to testify." Prantil, 764 F.2d at 554, quoting United States v. Tamura, 694 F.2d 591, 601 (9th Cir. 1982). McLain makes no argument that this standard interferes with his constitutional rights. The Court employs this standard in analyzing McLain's current claims.

McLain identifies no testimony that he would have elicited from Kossoris. The Court is left to infer that McLain is relying upon the matters identified in his attorney's motion.

Pell represented to the trial court that he would have Kossoris testify that Kossoris believed McLain was psychotic and would be likely to commit additional offenses. As to factual guilt, this offer of proof was obviously devoid of any relevance. Pell argued, however, that Kossoris' conclusions would be relevant to a mens Rea or mental capacity defense at the guilt phase of the trial and as evidence of McLain's insanity at a sanity trial. The trial court properly concluded, however, that Kossoris' testimony on this issue was likely to be inadmissible lay opinion and of minimal probative value.

Pell also suggested that Kossoris would be called to testify that he "dared" McLain to "prove him wrong" that McLain was guilty of the 1971 assaults on Whitman and Donaldson. Whether Kossoris actually "dared" McLain, however, was irrelevant. At most, to the extent the prosecution theorized that McLain returned for revenge, the only theory of relevance was McLain's contention that he returned to respond to the alleged dare. The issue there, however, was McLain's state of mind, not Kossoris' statements. McLain was permitted to, and did testify, that he returned to Ventura with an affidavit affirming McLain's innocence. Whether Kossoris had prompted McLain to do so was of little import.

Thereafter, Pell switched gears and argued that the significance of the "dare" was that, in fact, it did not occur and thus was evidence of McLain's insanity or diminished mental capacity. Used in this manner, however, the proposed testimony by Kossoris would have been undisputed and could have been introduced by way of stipulation. In such a situation, there would be no compelling need for Kossoris to testify. Tamura, 694 F.2d at 601.

McLain has identified no evidence that was material to his defense, let alone evidence which he had a "compelling need" to present through the testimony of trial prosecutor Peter Kossoris. The trial court's refusal to disqualify Kossoris on the basis of Kossoris' status as a potential witness did not interfere with McLain's ability to present a defense.

C. Personal Bias

1. Legal Standards

McLain also argues that Kossoris' participation was improper because Kossoris harbored "extreme personal prejudice" against McLain. The record confirms that McLain failed to establish constitutionally impermissible prejudice on the part of the prosecutor.

A claim challenging the personal bias of a prosecutor raises important and conflicting concerns over the role of advocates and the integrity of the criminal process. As Judge Kozinski observed for a unanimous Ninth Circuit panel, "lawyers representing the government serve truth and justice first." United States v. Kojayan, 8 F.3d 1315, 1323 (9th Cir. 1993). "[Their] job," he continued, "isn't just to win, but to win fairly, staying well within the rules." Id. This observation is founded upon considerations that have been recognized since the turn of the century:

> [A criminal prosecutor] is the representative not of an ordinary party to a controversy, but of a

> sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.... He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935). Accord Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 807 (1987), United States v. Hill, 953 F.2d 452, 458 (9th Cir. 1991).

These concerns apply with equal force to state prosecutors. Sheppard v. Rees, 909 F.2d 1234, 1238 (9th Cir. 1989).

"Because of this unique responsibility, federal prosecutors are prohibited from representing the Government in any matter in which they, their family, or their business associates have any interest." Young, 481 U.S. at 803 (citing 18 U.S.C. § 208(a)). These limitations, although not the federal statute, apply to state prosecutors as well.

On two previous occasions, the Supreme Court has held that the participation of an interested or biased prosecutor directly implicates the fundamental fairness of the trial itself. Marshall v. Jerrico, Inc., 446 U.S. 238, Young, 481 U.S. at 808 n.19. At the same time, "the standards of neutrality for prosecutors are not necessarily as stringent as those applicable to judicial or quasi-judicial officers." Young, 481 U.S. at 810.

Whereas judges are entrusted "to make the final decision and whose impartiality serves as the ultimate guarantee of a fair and meaningful proceeding in our constitutional regime," Marshall, 446 U.S. at 250, prosecutors are partisan advocates who "are necessarily permitted to be zealous in their enforcement of the law."

Marshall, 446 U.S. at 248. While a judge must remain impartial, "[p]rosecutors need not remain entirely 'neutral and detached.'" Id. The prosecutor's role is compromised when his or her official position is subject to being misused to further ulterior objectives that are irrelevant to the government's interest in vindicating the law. Marshall, 446 U.S. at 249-50, F.T.C. v. American Nat'l Cellular, 868 F.2d 315, 319 (9th Cir. 1989), Wright v. United States, 732 F.2d 1048, 1056 (2d Cir. 1984), cert. denied, 469 U.S. 1106 (1985).

Although the Supreme Court expressly left open "whether different considerations might be held to apply if the alleged biasing influence contributed to prosecutions against particular persons, rather than to a general zealousness in the enforcement process," Young, 481 U.S. at 810 n.22, quoting Marshall, 446 U.S. at 250 n.12, McLain does not identify any other factors that this Court should consider.

Quite significantly, however, "[t]he fact that a judge has strong feelings on a particular crime does not automatically disqualify him from sentencing those who have committed that crime." United States v. Borrero-Isaza, 887 F.2d 1349, 1357 (9th Cir. 1989). A fortiori, since prosecutors are held to a lesser standard of neutrality, Young, 481 U.S. at 810-11, Marshall, 446 U.S. at 249-50, a prosecutor's strong feelings about a particular crime will not compel recusal from the case. One case from the Second Circuit, however, has found it inappropriate for lawyers to serve as prosecutors when they have "an axe to grind against the defendant, as distinguished from the appropriate interest that members of society have in bringing a defendant to justice with respect to the crime with which he is charged." Wright, 732 F.2d at 1056.

Beyond simply challenging Kossoris' alleged partiality, McLain asserts that the entire Ventura County District Attorney's Office should have been recused. "The general trend of the law has been to limit the applicability of

vicarious disqualification rules to private organizations." United States v. Lorenzo, 995 F.2d 1448, 1453 n.1 (9th Cir.), cert. denied, 114 S. Ct. 225 (1993). Proof of Kossoris' bias is insufficient to require disqualification of the entire Ventura County District Attorney's Office.

2. McLain Made No Prima Facie Showing of Bias

McLain submitted no evidence calling into question the lack of personal bias on the part of the District Attorney, Michael Bradbury. The record contains only one piece of evidence relating to Bradbury: his letter to the parole board in 1977 stating that the office was "vehemently opposed" to the possibility of McLain's early release and calling McLain "one of the most depraved, dangerous and heinous criminals ever to come out of our county." (2 C.T. 402.) These remarks do not reflect any ulterior motive or personal bias on the part of Bradbury. They are nothing more than a statement of the office's and, possibly his own, "strong feelings on a particular crime." Borrero-Isaza, 887 F.2d at 1357. McLain failed to make a prima facie showing of personal interest on the part of the Michael Bradbury and the Ventura County District Attorney's Office in general. There was no constitutional error in the trial court's denial of the motion to recuse the entire District Attorney's office.

McLain's allegations and argument have focused mostly upon Kossoris. Even assuming that personal animosity would be sufficient to disqualify a prosecutor, in this case the allegations are unsupported by the record. At the outset, it should be confirmed that no one disputes that Kossoris was not related by blood or marriage to any of the victims, prosecution witnesses, or their families. Nor is there any suggestion that Kossoris had any business or financial dealings with any of them. McLain's recusal motion based on Kossoris' alleged bias was premised on the assumption that Kossoris had become close personal

friends with the Whitman family. The record, however, ultimately did not bear out this assertion.

Although McLain averred in conclusory form that Kossoris was a close friend of the Whitmans, he did not dispute Kossoris' specific statements, sworn to under penalty of perjury, that during 1971 and 1972 Kossoris' only contacts with the Whitman family were related to keeping them informed of the status of the ongoing prosecution, that he never met with the Whitmans at social gatherings, and that he had no contact with the Whitmans from the end of the 1971 case until the beginning of the investigation of the 1979 case. McLain did not question the veracity of these allegations. The trial court was entitled to accept them as true.

McLain also asserted that Kossoris felt guilt and personal responsibility for McLain's 1979 crimes by not having done all he could to prevent McLain's early release. It is true that in 1972, shortly after McLain was sentenced, Kossoris filed a brief statement of his views on McLain and McLain's crimes pursuant to California Penal Code § 1203.01. Therein, Kossoris characterized McLain as "one of the most incorrigible criminals" and McLain's 1971 crimes as "one of the most aggravated" he had ever seen. He also opined that McLain was "highly dangerous, psychopathic and totally immoral." Kossoris recommended to the parole authority that McLain "[n]ever again be released." Kossoris concluded by requesting the opportunity to testify if McLain was ever considered for parole. (2 C.T. 377.)

Approximately a year after McLain was sentenced, Kossoris was contacted by letter by McLain. In the letter, McLain asked for assistance from Kossoris in obtaining release from prison. In response, Kossoris suggested that McLain refrain from calling upon the District Attorney's Office for any further assistance. He informed McLain that he was unable to "work up any sympathy" for McLain and that he was absolutely convinced that McLain was

indeed guilty of the crimes he was charged with, despite McLain's claims of innocence.

Kossoris, however, directly denied this allegation that he felt guilty and personally responsible for McLain's 1979 crimes. McLain did not dispute this point of Kossoris' declaration as to Kossoris' own state of mind and did not seek a hearing thereon. In the absence of any disputed facts, the trial court was entitled to accept Kossoris' version as true without holding a formal hearing.

Kossoris acknowledged that he felt "especially repugnant" toward McLain, expressed his belief that McLain "deserves to die" for his crimes and that "any punishment less than capital punishment would be inappropriate." As for the assertions that Kossoris had allegedly told Pell that he wanted to shoot, hang, or poison McLain, Kossoris explained that these statements had been taken out of context. As for the "shoot" and "hang" comments, Kossoris stated that the context of the conversation clearly indicated that these were only expressions of his personal opinion as to the appropriate punishment and, to the extent any suggestion was made that the execution be extrajudicial, the context and intonation clearly indicated that Kossoris was only joking. Again, Pell did not dispute that his declaration misrepresented the nature of Kossoris' remarks and had taken them out of context. The comments may have been ill-conceived and unprofessional, but they do not show impermissible bias.

As for the decision to seek the death penalty, Kossoris explained that the decision to seek the death penalty in the Ventura case was made by a three- person committee consisting of Kossoris, the District Attorney and the Chief Deputy District Attorney, and that the decision to seek the death penalty was unanimous. Kossoris said he told Pell of the decision before the Solano trial because the decision was made before the Solano trial. The only accusation that remains unexplained is the allegation that Kossoris said that the office would

proceed for a death verdict irrespective of any other events. This lone comment, however, is too typical of contentious posturing to support an inference of unconstitutional bias.

The remaining allegations are not indicia of Kossoris' personal bias as much as they are attempts to infer bias from alleged prosecutorial overreaching. Kossoris allegedly attempted to meddle with payment of the attorneys' fees by submitting a proposed scheduling order that would have cut-off the attorney's right to compensation in the event that certain motions were not filed by a specified date, irrespective of the reason for the delay. Kossoris declared that the request to terminate the attorney's compensation was part of a motion for sanctions in light of his perception that counsel was attempting to unjustifiably delay the proceedings. (2 C.T. 376.) In addition petitioner alleged that Kossoris may have made improper argument to the jury. However such actions are not the type of structural defects that were intended to be included within the rubric of prosecutorial bias. These instances arguably might be treated as by-products of bias if it were found to exist. Standing alone, however, the episodes are too similar to the problems that occur in ordinary trials to provide a basis for inferring improper prosecutorial bias. As noted by the Supreme Court, adopting the rationale of the Sixth Circuit, allegations of prosecutorial overreaching should be dealt with on their own terms, separate from the rubric of impermissible bias:

> It is true that prosecutors may on occasion be overzealous and become overly committed to obtaining a conviction. That problem, however, is personal, not structural.... [S]uch overzealousness "does not have its roots in a conflict of interest. When it manifests itself the courts deal with it on a case-by-case basis as an aberration. This is quite different from approving a practice which would permit the appointment of prosecutors whose

undivided loyalty is pledged to a party interested only in a conviction."

Young, 481 U.S. at 807 n.18, quoting Polo Fashions v. Stock Buyers Int'l, 760 F.2d 698, 705 (1985), cert. denied, 482 U.S. 905 (1987).

While another prosecutor might have objected to offering immunity to Ketcherside or using jailhouse informants to establish McLain's guilt, these decisions were undeniably also motivated by far too many other intangible factors to render these decisions reviewable by this Court. At most, these could be considered aspects of prejudice, if any existed. They are insufficient to create the appearance of bias in the absence of concrete evidence.

The Attorney General goes one step further in arguing that the trial court made implicit factual findings that Kossoris was not personally biased and that these factual findings are binding on this Court. 28 U.S.C. § 2254(d). This argument misreads the record. There is no transcript of the hearing on the motion. (1 R.T. 102.) The only written record clearly indicates that trial judge concluded that McLain had failed to make a prima facie showing of personal bias and, therefore, no further inquiry was necessary. (2 C.T. 382.) To the extent there were conflicting versions of the facts, the Attorney General fails to explain how the trial judge could have made a credibility determination based simply on the face of paper declarations without holding a hearing. Cf. Data Disc v. Systems Technology Assocs., 557 F.2d 1280, 1285 (9th Cir. 1977), Townsend v. Sain, 372 U.S. 293, 322 (1963).

D. Conclusion

McLain failed to show that Kossoris had a personal interest in the prosecution of the case that significantly differed from the ordinary interest society had in bringing to justice those charged with a crime. McLain also failed to establish that Kossoris "harbored extreme personal

prejudice" against McLain to such a degree that McLain was deprived of his due process right to an impartial and disinterested prosecutor.

McLain's tenth claim for relief is denied.

XI. Eleventh Claim: Search and Seizure

In Stone v. Powell, 428 U.S. 465 (1976), the United States Supreme Court held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." Stone, 428 U.S. at 494. The Supreme Court clearly identified the premise upon which it was acting. It noted that the exclusion would apply only to those "who have been afforded the opportunity for full and fair consideration of their reliance upon the exclusionary rule with respect to seized evidence by the state court at trial and on direct review." Id., 428 U.S. at 489. Thus, the Ninth Circuit has reaffirmed that "[t]o be eligible for habeas relief on Fourth Amendment claims, a petitioner must demonstrate that the state court has not afforded him a full and fair hearing on those claims." Woolery v. Arave, 8 F.3d 1325, 1328 (9th Cir. 1993).

McLain argues that the State did not provide him a full and fair opportunity to litigate his fourth amendment claims because it denied his -- and has a practice of denying all -- state habeas petitions raising fourth amendment claims without an order to show cause, thereby "routinely and systematically prevent[ing] the actual litigation of such claims on the merits." (3d Am.Ptn., P 42.F., p.38.)

The fault in this argument is that the state court did not deny McLain the opportunity to litigate his fourth amendment claims at either the trial or appellate level. In fact, he secured full review at both levels. At the trial level

he actually litigated the fourth amendment claims and lost on the merits.

At the appellate level, while California generally frowns upon raising fourth amendment claims on post-conviction habeas review, see In re Sterling, 63 Cal.2d 486, 487-88, 47 Cal. Rptr. 205 (1965), In re Harris, 5 Cal.4th 813, 830, 21 Cal. Rptr. 2d 373, 381 (1993), here the state court actually considered the fourth amendment claims and denied them on the merits. The absence of an order to show cause did not prejudice him because appellate review does not ordinarily entail relitigation of the factual findings underlying the fourth amendment claims. Since the state court did not rest its denial on the procedural rule of Sterling and addressed the claim and denied it on the merits, McLain was not deprived of appellate review due to appellate counsel's failure to raise the claim earlier. The only difference between the habeas denial and an affirmance on direct appeal is that, on direct appeal, McLain would likely have been provided with a written explanation for the reasons. Since a written opinion ordinarily has no impact on federal habeas review of fourth amendment claims, Stone, 428 U.S. 465, McLain cannot show any prejudice from appellate counsel's failure to raise the issue on direct appeal. Even assuming appellate counsel was deficient in not raising the fourth amendment claims, McLain suffered no prejudice because he actually obtained appellate review of the claims.

Furthermore, the rule of Stone is premised upon the opportunity to raise and litigate claims, not the actual litigation thereof. McLain clearly had the opportunity to raise the fourth amendment claims on direct appeal, but failed to do so. The California Supreme Court regularly reviews fourth amendment claims on the merits when raised on direct appeal. Sterling, 63 Cal.2d at 489. McLain made no showing that he was unable to raise (or was somehow prevented from raising) the issue during his direct appeal, either through his opening brief or the numerous supplemental briefs filed before the appellate

opinion was filed. McLain was afforded the opportunity and did not take advantage of it. This is not a fault with the state procedures themselves. Stone applies. His fourth amendment claims are not cognizable in this habeas proceeding.

XII. Twelfth Claim: Prior-and Felony-Murder Special Circumstances -- Failure to Establish Intent

Petitioner, in his twelfth claim for relief, asserts that because the felony- murder special circumstance and the prior-murder special circumstance were found to be true without particular determinations of McLain's intent to kill or other culpable mental state, his death sentence was unlawfully imposed in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

There appear to be three arguments: (1) the imposition of the death penalty was disproportionate in violation of the Eighth Amendment because there was no finding of the requisite culpability; (2) McLain's due process rights were violated because there was no proper finding under California law of intent to kill to support a felony-murder special circumstance; and (3) McLain's due process and equal protection rights, the Ex Post Facto Clause, and the Eighth Amendment were violated when the California Supreme Court applied Anderson, 43 Cal.3d 1104, and not Carlos v. Superior Court, 35 Cal.3d 131, 197 Cal. Rptr. 79 (1985), to determine whether the felony-murder special circumstance instruction was sufficient.

The jury was instructed that, in order to find the felony-murder special circumstance true, "[i]f the defendant was not the actual killer, it must be proved beyond a reasonable doubt that he intentionally aided, abetted, counseled, commended, induced, solicited, requested or assisted the actual killer in the commission of the murder in the first degree ...." (R.T. 7998.)

The jury determined that the felony-murder special circumstance existed. The judge determined that the prior-murder special circumstance existed by virtue of the petitioner's conviction of the Solano County murder of Bazargani.

A. Eighth Amendment: Culpable Mental State and Proportionality

Petitioner asserts that his death sentence violates the Eighth Amendment because there was no finding of an intent to kill or other culpable mental state and therefore the sentence is disproportionate.

Petitioner argues that a correlation between the level of culpability and the criminal penalty imposed is essential under the Eighth Amendment. Petitioner asserts it was therefore necessary to determine whether McLain acted with the mens rea necessary to justify the penalty of death.

The Eighth Amendment prohibits sentences that are grossly disproportionate to the crime committed. Solem v. Helm, 103 S. Ct. 3001, 3006 (1983). In determining whether the imposition of a death sentence is proportionate to the crime, the Court should examine the dual purposes of the death penalty: retribution and deterrence. Enmund v. Florida, 102 S. Ct. 3368, 3377 (1982). Whether these purposes will be advanced by the imposition of the death penalty depends upon the subjective intent and moral culpability of the individual. Id.

In examining the subjective intent and moral culpability required for the imposition of the death penalty, the Supreme Court has held that the Eighth Amendment bars the imposition of the death penalty "on one ... who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." Enmund, 102 S. Ct. at 3376.

"[M]ajor participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the Enmund culpability requirement." Tison v. Arizona, 107 S. Ct. 1676, 1688 (1987). "[T]he reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though not its inevitable, lethal result." Tison, 107 S. Ct. at 1688.

Enmund does not require that a jury make the determination that the defendant had the requisite culpability or intent to justify the death penalty. Cabana v. Bullock, 106 S. Ct. 689, 696 (1986). "The decision whether a particular punishment -- even the death penalty -- is appropriate in any given case is not one that we have ever required to be made by a jury." Id. Enmund does not impose any particular form or procedure upon the States. Id. at 697.

In McLain's case, however, it was the jury that was responsible for making this finding. The Court must therefore "look to what the jury actually decided, not what we, as judges, believe the jury would have decided if they had been properly instructed. We have held that if jury instructions omit an element of the offense ... constitutional error results." Roy v. Gomez, 55 F.3d 1483, 1486 (9th Cir. 1995). Upon examining the jury instructions and the verdict forms, the Court is convinced that the jury did in fact find that the McLain personally killed Kelley and, moreover, that he specifically intended to kill Kelley.

The jury convicted McLain of first degree murder. (C.T. 1995.) This alone, however, is not sufficient to determine whether the jury found that McLain himself killed or intended to kill or whether it found only that a co- conspirator killed or that McLain aided and abetted in the killing. The jury also found that McLain personally used a firearm in the commission of the murder. (C.T.

1995.) Based on the instructions, the use of a firearm includes not only intentionally firing it, but also displaying it in a menacing manner and intentionally striking or hitting a human being with it. (R.T. 8002-03.) Thus, it is possible that the jury found that McLain used the firearm in a manner that did not cause Kelley's death and, therefore, this finding does not establish that the jury found an intent to cause death.

However, the jury also found that McLain conspired to murder Kelley. (C.T. 1999.) In order to find a conspiracy to murder, the jury was required to find "a specific intent to agree to commit the public offense of ... murder ... with the further specific intent to commit that public offense ..." (R.T. 7987.) Thus, in order to find the petitioner guilty of a conspiracy to murder, the jury had to find that he had the specific intent to murder.

According to the findings of the jury, McLain had the specific intent to kill Kelley.[2] Pursuant to the standard set forth in Enmund, this is sufficient to find that the imposition of the death penalty is not disproportionate. Therefore, McLain's sentence does not violate the Eighth Amendment.

The State argues that even if the finding of the felony-murder special circumstance was flawed, the prior-murder special circumstance would be sufficient to support the imposition of the death penalty. The purpose of Enmund's culpability requirement is to narrow the class of convicted murderers who deserve the death penalty. In the present case, the judge also found that the defendant had a prior-murder conviction. This special circumstance also fulfills the requirement of narrowing the persons for whom the death penalty would be a proportionate punishment. McLain does not argue that the prior-murder special circumstance is insufficient in itself to justify the

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2. Reading the jury instructions as a whole, in this case the finding of the specific intent to murder required to find conspiracy to murder is the equivalent of finding the specific intent to kill.

death penalty. Even if the jury had not found a specific intent to kill, the imposition of a death sentence on McLain would not be disproportionate to his culpable conduct.[3]

B. Felony-Murder Special Circumstance and Intent to Kill

Petitioner also argues that his due process rights were violated because the trial court failed to follow California law when it did not require a finding of intent to kill to support the felony-murder special circumstance.

In Carlos v. Superior Court, 35 Cal.3d 131, 197 Cal. Rptr. 79 (1983), the California Supreme Court, relying on Enmund, held that intent to kill is an element of the felony-murder special circumstance whether or not the defendant was the actual killer. This intent requirement was extended to the prior-murder special circumstance. People v. Malone, 165 Cal. App. 3d 31 (1985), disapproved by People v. Hendricks, 43 Cal.3d 584, 238 Cal. Rptr. 66 (1987).

However, in People v. Anderson, 43 Cal.3d 1104, 240 Cal. Rptr. 585 (1987), the California Supreme Court overturned Carlos, and by implication Malone. The California Supreme Court held that "intent to kill is not an element of the felony-murder special circumstance." Anderson, 43 Cal.3d at 1147. However, "when the defendant is an aider or abetter rather than the actual

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3. The petitioner does argue that because the special circumstances has a dual role of narrowing the scope of death eligibility and serving as an aggravating factor, if the felony-murder special circumstance was not properly found, its consideration as an aggravating factor prejudiced the petitioner in the penalty phase. After reviewing the record, the Court concludes that any error in the felony-murder special circumstance instruction was not reasonably likely to have had an effect on the jury's sentence. Whether or not the jury properly found the felony-murder special circumstance, the underlying facts remain unchanged. It is from those underlying facts that the jury determined the appropriate penalty.

killer, intent to kill must be proved" before the special circumstance can be found to be true. Id.

The California Supreme Court applied Anderson in rejecting petitioner's claim on appeal that the trial court erred in not instructing the jury that intent was an element of the felony-murder special circumstance. McLain, 46 Cal.3d at 107.

Petitioner asserts that Anderson was based on an erroneous interpretation and application of Cabana, 106 S. Ct. 689, and Tison, 107 S. Ct. 1676. Regardless of whether Anderson is well-reasoned or a correct interpretation of the California statute is not a proper inquiry on federal habeas corpus. The only proper inquiry is whether McLain was denied any rights guaranteed by the United States Constitution. California is free to adopt any procedure for determining who shall be subject to the death penalty as long as it protects the constitutional rights of its citizens. As discussed above, the application of Anderson to McLain met the constitutional requirements of Enmund.

"However, the failure of a state to abide by its own statutory commands may implicate a liberty interest protected by the Fourteenth Amendment against arbitrary deprivation by a state." Fetterly v. Paskett, 997 F.2d 1295, 1300 (9th Cir. 1993), cert. denied, 115 S. Ct. 290 (1994). In Anderson, California chose the procedure for finding the special circumstance of felony- murder. The California Supreme Court applied Anderson to McLain's claim on direct appeal and determined that the trial court had satisfied that procedure and that the instruction given was sufficient to meet the requirement that the jury find that an aider or abettor have the intent to kill. McLain, 46 Cal.3d at 107, citing People v. Warren, 45 Cal.3d 471, 486-88, 247 Cal. Rptr. 172, 182 (1988). This determination does not amount to a "failure of [California] to abide by its own ... commands." Cf. Fetterly, 997 F.2d at 1300.

Thus, there was no violation of Petitioner's constitutional right to a proper finding of intent to kill.

C. Application of Anderson Rather than Carlos

Petitioner argues that the California Supreme Court's application of Anderson, 43 Cal.3d 1104, rather than Carlos, 35 Cal.3d 131, violated his due process and equal protection rights, the Ex Post Facto Clause, and the Eighth Amendment of the Constitution.

Petitioner asserts that he was denied due process because his sentence was affirmed after a substantial change in the law -- Anderson -- and without an opportunity to present evidence in light of that change in the law. Petitioner further argues that because Anderson was such a substantial change in the law, its retroactive application to his case violated the Ex Post Facto Clause.

The Ex Post Facto Clause of the federal constitution prohibits enactments of law that punish conduct innocent when done, that impose greater punishment than when a crime was committed, or that lessen the rules of evidence from what was required when the crime was committed. Collins v. Youngblood, 110 S. Ct. 2715 (1990).

The Supreme Court has held that "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law." Bouie v. Columbia, 378 U.S. 347, 353-54 (1964). Such an application is unconstitutional.

The Ninth Circuit has specifically held that "retroactive application of Anderson does not offend federal rights where, as here, the conviction occurred before Carlos was decided." Hamilton v. Vasquez, 17 F.3d at 1164 (rejecting Ex Post Facto claim). See also Hunt v. Vasquez, 899 F.2d 878, 881 (9th Cir. 1990) (same), Hughes v. Borg, 898 F.2d 695, 704-05 (9th Cir. 1990) (no due process violation). As explained by the circuit, "current law is identical to the law in effect at the time of his offense. There is no ex post facto problem. [Petitioner] was on notice as to the punishment he could receive." Hunt, 899 F.2d at 881. Accord Hughes, 898 F.2d at 705.

Thus, although Petitioner's argument might have been persuasive had McLain committed his crimes and been tried at a time when Carlos was the controlling authority, at the time McLain committed his crimes, was tried, and was sentenced, Carlos had not yet been decided. Therefore, the retroactive application of Anderson to Petitioner does not make a drastic change in the law that applied to him at the time he committed his crimes.

In a similar vein, Petitioner argues that the refusal to reverse his sentence when the sentences of similarly situated defendants were reversed under Carlos, violated his right to equal protection. The Equal Protection Clause requires that "once the state has established a rule it must be applied evenhandedly." Myers v. Ylst, 897 F.2d 417, 421 (9th Cir.), cert denied, 111 S. Ct. 212 (1990). This does not prevent a state from changing its rule as long as the new rule is applied evenhandedly. Therefore, the application of the California law in Anderson did not violate McLain's equal protection rights as long as it was applied to all individuals whose appeal was heard by the Supreme Court after the Anderson decision. Petitioner has cited no case since the decision in Anderson to which Carlos was applied and not Anderson.

Petitioner also argues that imposition of the death penalty on him is arbitrary and capricious because had his appeal been decided prior to Anderson, his death sentence would have been overturned because of the lack of finding of intent. This does not amount to an arbitrary and capricious imposition of the death penalty. There was no "standardless discretion" utilized by the courts. The courts merely applied a new standard -- one that was articulated by the California Supreme Court.

McLain has failed to demonstrate a constitutional violation arising out of the special circumstances' failure to require a finding of intent. The Court denies Petitioner's twelfth claim for relief.

XIII. Thirteenth Claim: Improper Application of Prior-Murder Special Circumstance

Petitioner's thirteenth claim for relief asserts that because the prior-murder special circumstance was erroneously applied based on the commission and conviction of a murder that occurred after the murder that is the subject of the present case, his death sentence was unlawfully imposed in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

The murder of Joni Kelley occurred on or about November 7, 1979 in Ventura County. The murder of Diane Bazargani occurred in Solano County several days later -- on November 11, 1979. McLain was convicted of the Bazargani murder on July 11, 1980. He was tried for the murder of Joni Kelley and the related charges in Ventura County after the conclusion of the Bazargani trial. The Ventura County judge found the prior-murder special circumstance to be true based solely on the Bazargani conviction.

McLain argues that the finding of the prior-murder special circumstance based on a murder and conviction that occurred after the instant offense is contrary to the language of California Penal Code § 190.2(a)(2). According to McLain, the invocation of the prior-murder special circumstance violated his rights to due process and a reliable sentencing determination.

He further argues that the interpretation of section § 190.2(a)(2) contained in Hendricks, 43 Cal.3d 584, as applied to his case, rendered the statute impermissibly vague at the time of his trial and also violated the ex post facto and due process clauses of the United States Constitution.

California Penal Code § 190.2 provides in relevant part:

> (a) The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in state prison for a term of life without

possibility of parole in any case in which one or more of the following special circumstances has been ... found ... to be true:

* * *

(2) The defendant was previously convicted of murder in the first degree or second degree.

In Hendricks, the California Supreme Court interpreted § 190.2(a)(2) to require only that the defendant be convicted of murder prior to the conviction to which the special circumstance is applied. Hendricks, 43 Cal.3d at 595- 96. The court refused to require that the defendant commit and be convicted of the "prior murder" before the commission of the instant murder. Id. The court held "[t]he order of the commission of the homicides is immaterial." Id. Thus, even though the murders that formed the basis of the special circumstance occurred after the murder for which the defendant received the death penalty, the court determined that the fact that there had been a conviction prior to the instant conviction was sufficient. Id.

Whether the California Supreme Court properly interpreted § 190.2(a)(2) is not a claim that is cognizable on federal habeas corpus. "[F]ederal habeas corpus relief does not lie for errors of state law." Lewis v. Jeffers, 110 S. Ct. 3092, 3102 (1990). "[F]ederal habeas review of a state court's application of a constitutionally narrowed aggravating circumstance is limited, at most, to determining whether the state court's finding was so arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation." Lewis, 110 S. Ct. at 3102. The only exception is if the state court's interpretation is "an obvious subterfuge to evade the consideration of a federal issue." Peltier v. Wright, 15 F.3d 860, 862 (9th Cir. 1994). Thus, the only questions are whether the interpretation of the statute is a subterfuge, whether the statute (as interpreted) is constitutional, and whether the statute was applied in a manner that is arbitrary and capricious.

In the present case, the interpretation of the statute is not a subterfuge for evading federal review. Petitioner does not argue that the state court's interpretation of the statute is a subterfuge and there is no apparent basis for such an argument.

The statute, as interpreted, is not unconstitutionally vague. An attack on an aggravating factor as impermissibly vague will not prevail so long as the statute "gives meaningful guidance to the sentencer." Walton v. Arizona, 110 S. Ct. 3047, 3058 (1990). The plain language of the statute gives meaningful guidance. It provides that the special circumstance is present where there is a conviction prior to the present conviction for murder. The interpretation of the statute that it does not matter whether or not the other murder is committed before this murder is not overbroad or impermissibly vague.

Furthermore, the application of the interpretation of the statute in Hendricks to the petitioner is not arbitrary or capricious and does not violate the Due Process or Ex Post Facto Clauses. The Supreme Court has held that "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law." Bouie, 378 U.S. at 353-54. Such an application is unconstitutional.

Hendricks is not an unforeseeable enlargement of the statute. It is a reasonable interpretation of a statute that the California Supreme Court had not previously interpreted. The interpretation in Hendricks is within the scope of the statute as enacted.

Furthermore, since the interpretation of the statute was foreseeable, its application to McLain does not violate his due process rights.

Finally, the application of Hendricks' interpretation to McLain was not arbitrary or capricious. The statute gives sufficient warning of the interpretation adopted in Hendricks. The fact that a defendant has committed other murders, even if they were committed after the murder underlying the present trial, provides a meaningful basis

for distinguishing between those who should be eligible for the death penalty and those who should not.

The Court therefore denies Petitioner's thirteenth claim for relief.

XIV. Fourteenth Claim: Statute's Failure to Narrow Jury Discretion

McLain has styled his fourteenth claim for relief as a complaint that the death penalty statute fails to adequately narrow the jury's discretion. His arguments, however, focus upon the admission of several evidentiary matters that were somewhat inflammatory, but allegedly irrelevant to the jury's determination of whether McLain should be sentenced to death.

The State failed to address many of the arguments raised by McLain -- confining its citations to the rejection of several facial challenges to California's death penalty statute and three pattern jury instructions and then summarily concluding that everything else is a matter of state law.

A. Victim Impact Evidence

McLain complains that the prosecution was allowed to have Donaldson and Whitman -- the 1971 rape victims -- testify as to the harm and injury they suffered during the 1971 crimes and to use that information to argue that the Kelley murder and the 1979 attempted burglary of Whitman's apartment frightened Donaldson, Whitman, and their families. McLain accuses the prosecutor of having deliberately and unfairly prejudiced the jury by injecting the emotions and sympathies generated by reference to the injuries suffered by the victims and survivors.

The Supreme Court ruled in Payne v. Tennessee, 501 U.S. 808 (1991):

> [I]f the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed.

Payne, 501 U.S. at 827.

The Supreme Court established only two qualifications to this holding. If the evidence introduced "is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." Payne, 501 U.S. at 825. The Court cautioned that it expressed no criticism of its prior holding in Booth v. Maryland, 482 U.S. 496 (1987) that "the admission of a [murder] victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment." Payne, 501 U.S. at 830 n.2.

More cogent than the fact that the prosecution's evidence was admissible under Payne is the fact that it was not even impermissible under Booth. Booth, which was subsequently overruled in part by Payne, held that "the presence or absence of emotional distress of the [murder] victim's family, or the [murder] victim's personal characteristics, are [not] proper sentencing considerations in a capital case." Booth, 482 U.S. at 507. Significantly, the evidence here related to the victims of prior crimes committed by McLain. Even Booth acknowledged that this "type[] of information may well be admissible [when it] relate[s] directly to the circumstances of the crime." Id., at 507 n.10. Quoting from an intermediate appellate court in California, the Booth Court reasoned:

> [A] defendant's level of culpability depends not on fortuitous circumstances such as the composition of his victim's family, but on circumstances over which

he has control. A defendant may choose, or decline, to premeditate, to act callously, to attack a vulnerable victim, to commit a crime while on probation, or to amass a record of offenses.... In contrast, the fact that a victim's family is irredeemably bereaved can be attributable to no act of will of the defendant other than his commission of homicide in the first place. Booth, 482 U.S. at 504 n.7.

The Court finds that the pain and suffering McLain inflicted upon the victims of his prior crimes and upon the murder victim herself and his return to Ventura to seek revenge are all relevant "circumstances of the crime" or matters over which McLain had control and, therefore, were admissible under the more lenient standard in Booth.

California law specifically authorizes the admission of this type of evidence. People v. Edwards, 54 Cal.3d 787, 833-36, 1 Cal. Rptr. 2d 696 (1992). There is no viable claim that the evidence was unduly inflammatory. There was no evidence relating to the survivors' sentencing preferences. Payne, 111 S. Ct. at 2611 n.2. The only argument on this point was minimal, a proper response to defense counsel's argument, buried within other proper rebuttal arguments, and blunted by its lack of emphasis as a basis for a death sentence. (R.T.Aug. 78:28-79:9.)

The evidence and argument did not transcend constitutional limits.

B. Bad Character Evidence and Argument -- Eighth Amendment Limitations

McLain appears to argue that character evidence can constitutionally be admitted only as a mitigating factor. If this is the claim, it is without merit. The Supreme Court has plainly ruled that, so long as the statutory aggravating circumstances adequately narrowed the class of persons who could be eligible for death, "the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class,

those defendants who will actually be sentenced to death." Zant v. Stephens, 462 U.S. 862, 878 (1983). The Court noted, however, that the States are "free to decide as a matter of state law to limit the evidence of aggravating factors that the prosecution may offer at the sentencing hearing." Id., at 878 n.17. As a matter of pure Eighth Amendment jurisprudence, the introduction of character evidence is not per se unconstitutional.

C. Bad Character Evidence and Argument -- Due Process Limitations

1. The Claim is Cognizable

Pure errors of state law are not cognizable on federal habeas corpus. McGuire, 502 U.S. at 67. Contrary to the Attorney General's argument, however, that principle does not completely resolve the issue raised here.

The claim is not simply that the trial judge misinterpreted an evidentiary rule relating to the use of character evidence. Nor is it solely a question of whether to admit or exclude character evidence in general. Rather, the claim raises a more fundamental question of the evidence's underlying relevance. As California has limited the jury's penalty determination to a review of the statutory factors -- at least for purposes of aggravation -- People v. Boyd, 38 Cal.3d 762, 773-74, 215 Cal. Rptr. 1 (1985), evidence that is not related to the statutory factors is not relevant.

Thus, McLain's claim is not simply a complaint against using character evidence. Nor is it a claim that the evidence was unduly inflammatory or that, although probative, on balance, the relevance was outweighed by its potentially prejudicial impact. Instead, the claim is premised on the contention that the evidence is not probative at all. The State may not inject irrelevant and prejudicial evidence into the sentencing equation when there is a significant likelihood that this evidence will

seriously infect the balancing process crafted by the state statute. Barclay v. Florida, 463 U.S. 939 (1983), Wainwright v. Goode, 464 U.S. 78 (1983).

Unlike many cases where a habeas writ is sought on the basis of the introduction of irrelevant evidence, here there is no dispute that the evidence was irrelevant. The state supreme court clearly found that the evidence under consideration was "irrelevant to the only factor potentially available ... since each was either noncriminal or nonviolent or both." McLain, 46 Cal.3d at 110. The Attorney General does not seriously disagree.

As recently reaffirmed by the Ninth Circuit, "claims of inadmissibility of evidence [can be] cognizable in habeas corpus proceedings." Hamilton v. Vasquez, 17 F.3d at 1159. The federal constitution, however, is not implicated unless "admission of the evidence violated the defendant's due process rights by rendering the proceedings fundamentally unfair." Id.

Nor is this principle limited to the guilt phase. Barclay and Goode make clear that the facial validation of a death penalty scheme is not independently sufficient. The states must actually adhere to their procedures. It cannot be overlooked that the invalid aggravating factors involved in Barclay and Goode were themselves constitutionally permissible. Barefoot v. Estelle, 463 U.S. 880 (1983) (future dangerousness -- considered in Goode), Stephens, 462 U.S. at 878 (criminal record -- considered in Barclay). Even though the evidence did not itself transgress any independent constitutional boundaries, the Supreme Court nonetheless considered it important to ensure that the state statute's balancing process had not been impermissibly infected by this extraneous evidence.

Nonetheless, not every minor deviation will amount to a constitutional violation. "[A]lthough not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state-court judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error." Stephens, 462

U.S. at 885. The Due Process Clause bars the enforcement of a death judgment where the state has skewed the balancing process "by placing a 'thumb [on] death's side of the scale.'" Sochor v. Florida, 504 U.S. 527, 532 (1992), quoting Stringer, 503 U.S. at 232. In such situations, facial validation of the statute will not save the death verdict and the court must determine whether the breach has substantially "infect[ed] the balancing process created by the [state] statute." Goode, 464 U.S. at 86.

Like the analogous situation where the jury is instructed on an improper basis for conviction, paraphrasing the words of Judge Fernandez, "[w] hile one cannot deny that there was evidence from which one could find [aggravating factors sufficient to warrant a death verdict] ... [it would be] rather jarring to say that [defendant] could be [sentenced based] on a non- existent legal theory." Suniga v. Bunnell, 998 F.2d 664, 669 (9th Cir. 1993).

2. The Disputed Evidence

There are six basic items of evidence about which McLain complains. First, there is the testimony that, at least once, McLain told Todd Forbes that the bathroom in the church would be a good place to commit a rape because it was noisy and would be difficult to be heard and, on several occasions, expressed to Todd Forbes his general desire to commit a rape. (36 R.T. 9109-21, 37 R.T. 9345.) Second, there is David Hicks' testimony that McLain invited him to go up to Santa Barbara to commit some rapes, explaining that Santa Barbara was a good place to rape women because there were a lot of women around and the streets were dark. (35 R.T. 8624-25.) The third item is David Hicks' testimony regarding McLain's solicitation of Hicks' assistance in escaping from jail. (35 R.T. 8617-17.)

Also included are the conversations with the two deputies. One was the conversation with Deputy Williams

where Deputy Williams asked McLain what made him tick. McLain's response was that his life was lousy and that he was always being unfairly blamed for things and that he might as well go out and commit more crimes. When Williams asked McLain why he did not commit suicide, McLain said that he wanted to kill a police officer if he was going to die, that he would kill a police officer if he were returning from a crime, and that under any circumstances he would shoot Deputy Williams. (34 R.T. 8396-8407.) The other was the conversation with Deputy Zermeno where McLain suggested that he was working on mastering the key to the handcuffs and stated that he would commit a violent escape in the future. (34 R.T. 8408-09, as corrected 37 R.T. 9379-80.) The sixth item is the letter to his niece where he stated that if released he would "not try to do right." (35 R.T. 8724-27.)

The testimony regarding McLain's habit of sitting in his parked car and getting out when a woman walked by and taking his dark sunglasses with him at night is not challenged as impermissible character evidence. Nor is the evidence regarding McLain's statement that he wore tennis shoes because they were quieter. Although occasionally referred to in the argument, these items were not challenged in the petition. As matters outside the petition, they cannot form the basis for McLain's claim. Moreover, challenges to these additional items of evidence are arguably unexhausted.

3. The Claim is Subject to Harmless Error Analysis

McLain contends that once the Court finds that inadmissible evidence was presented to the fact-finder, there can be no analysis for harmless error. McLain asserts that the death sentence would have to be summarily vacated and the case remanded for a new trial.

The application of the harmless error doctrine is guided by the Supreme Court's acknowledgment, over a

quarter century ago, that there are "some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless." Chapman v. California, 386 U.S. 18, 22 (1967), quoted in Brecht, 113 S. Ct. at 1717. The "general rule" is that "[w]here 'the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis.'" Castillo v. Stainer, 997 F.2d 669, 669 (9th Cir. 1993), modifying 983 F.2d 145 (9th Cir. 1992), quoting Rose v. Clark, 478 U.S. 570, 579 (1986). As more recently reaffirmed, the harmless error doctrine will usually be applied whenever the errors "'may ... be quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on the trial].'" Brecht, 113 S. Ct. at 1717 (ellipsis and brackets in original), quoting Fulminante, 499 U.S. at 307-08. In the phraseology of Fulminante, these types of errors are referred to as "trial error" as opposed to "structural error."

As explained by Satterwhite v. Texas, 486 U.S. 249, 258 (1988), the assessment of whether the error was harmless "is not whether the legally admitted evidence was sufficient to support the death sentence ..., but rather, whether the State has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" Satterwhite, 486 U.S. at 258-59. In the context of collateral review, the "harmless beyond a reasonable doubt" test shifts to whether the introduction of the evidence was likely to have a "substantial and injurious effect or influence in determining the jury's verdict." McKinney v. Rees, 993 F.2d 1378, 1385 (9th Cir. 1993), quoting Brecht, 113 S. Ct. at 1713. As interpreted in Wade v. Calderon, 29 F.3d 1312 (9th Cir. 1994), cert. denied, 115 S. Ct. 923 (1995):

> In determining whether an error is harmless, "the question is not were they [the jurors] right in their judgment, regardless of the error or its effect on the

verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision."

Wade, 29 F.3d at 1322 (emphasis and brackets in original, internal quotations omitted), quoting Brecht, 113 S. Ct. at 1724 (Stevens, J., concurring). Accord McKinney, 993 F.2d at 1385-86.

4. The State Supreme Court Did Not "Cure" the Harm

Ignoring the merits of the underlying issue and failing to attempt any explanation as to why the error was not harmless, the Attorney General instead argues only that the state supreme court "cured" the error by declaring it harmless. This is wrong for several reasons.

First, the issue of "harmlessness is a mixed question of fact and law" and therefore considered de novo. Suniga, 998 F.2d at 667. Second, the argument misperceives the role of the federal court. This Court does not sit as a super- appeals court, reviewing the state supreme court's opinion. Rather, this Court is asked to assess whether the trial itself comported with due process. The state court's analysis, while potentially enlightening, does not resolve the issue. Unlike Barclay v. Florida, 463 U.S. 939, and Wainwright v. Goode, 464 U.S. 78, relied on by the Attorney General, the state supreme court here did not review the propriety of the death sentence de novo nor did it comparatively review the death verdict to other death or non-death cases. Also unlike Barclay, California has no clear policy for determining when to affirm or reverse a death verdict that was affected by errors during the deliberative process. Indeed, one might consider a California jury's verdict is a far more portentous event than ones in Florida. A verdict of life in California is not simply given great deference but subject to being overturned. It is final.

In any event, even if the state court's analysis could have cured the error, it did not do so in this case. The state court's harmlessness analysis was little more than a perfunctory recitation of the formula for harmless error. While "[a]n appellate court can fulfill its obligations of meaningful review ... without uttering the magic words 'harmless error,' the reverse is not true. An appellate court's bald assertion that an error of constitutional dimension was 'harmless' cannot substitute for a principled explanation of how the court reached that conclusion." Sochor, 504 U.S. at 541 (O'Connor, J., concurring) (citation omitted).

5. The Prosecutor's Argument

The harm that allegedly flowed from the admission of this admittedly- irrelevant evidence is not assessed simply by reviewing the evidence itself. The Court must also consider the degree to which the evidence was emphasized to the jury during arguments. Clemons v. Mississippi, 494 U.S. 738, 753 (1990).

The Court has carefully reviewed the closing arguments made by the prosecutor, the themes he developed through his arguments, and the reliance that he placed on the improperly admitted evidence. The items challenged here undeniably attracted a fair amount of the prosecutor's attention and he made extensive use of them during argument. (R.T.Aug. 18:23-19:5, 25:17-26:4, 27:11-26, 28:17- 30:11, 38:19-25, 39:18-21, 75:26-27, 76:1-2, 83:22-84:7). The prosecutor's penalty phase argument appears to be relatively unique in that the capital murder conviction was not a significant focus of his argument in support of a death verdict. Over everything else, however, the most prominently featured matters were McLain's prior crimes and other instances of conduct -- all items that were conceded to have been properly admitted and argued.

6. Assessing Prejudice

Considering the entirety of the evidence and arguments presented at both the guilt and penalty phases of the trial, the Court cannot conclude that the improperly admitted items had a substantial and injurious effect on the penalty verdict. With the exception of the note he wrote to Hicks asking for assistance in escaping, all the evidence here involved nothing more than statements made by McLain; with this one exception, none of the evidence related to any actions that McLain undertook. McLain did not actually rape anyone in the church bathroom; he never shot a police officer; there was no evidence that he ever committed any crimes in Santa Barbara. He did commit rapes, but the jury already knew that. The inadmissible evidence amounted to nothing more than abstract statements. In light of the substantial other aggravating evidence presented by the prosecution, including the nature of the crimes themselves, the Court is unpersuaded by McLain's implicit suggestion that the jury was likely to be influenced to sentence him to death based on statements -- no matter how obnoxious -- that he had made in the past. McLain's own psychologist, Dr. Evans, testified that McLain was a pathological liar. The jury had already rejected McLain's testimony that he did not participate in killing Kelley and that he was in Ventura with an affidavit to present to Whitman stating that McLain had not attacked her in 1971.

McLain has not identified any distortions to the ordinary penalty trial process that resulted from the admission of the inadmissible evidence. Cf. Boyd, 38 Cal.3d at 773-74, In re Jackson, 3 Cal.4th 578, 613-14, 5 Cal. Rptr. 2d 531 (1992).

The challenged evidence was not aimed at proving any issue that was a basis for the jury's decision. It was, in the simplest of legal terms, irrelevant. It was irrelevant, according to the California Supreme Court, because this evidence had "no tendency ... to prove or disprove any

disputed fact that is of consequence to the determination of the action." Cal.Evid.Code § 210, Boyd, 38 Cal.3d at 774. McLain fails to demonstrate that any of the evidence was "emotionally charged;" it was, instead, "a waste of time." McKinney, 993 F.2d at 1380.

None of the evidence complained of in Claim XIV was independently inadmissible by virtue of the United States Constitution. The Court does not discount the opinion of the trial judge -- who observed all the guilt and penalty phase witnesses -- that the mitigating evidence was not insignificant. Nonetheless, the properly admitted aggravating evidence was substantial. The Court finds that the introduction of this additional irrelevant evidence did not render McLain's trial fundamentally unfair. McLain's procedural due process rights were not offended. A fortiori, the Court cannot conclude that the addition of the irrelevant evidence had a "substantial and injurious effect" on the penalty verdict.

McLain's fourteenth claim for relief is denied.

XV. Fifteenth Claim: Skipper Error

McLain's fifteenth claim for relief asserts that the trial court deprived him of a fair penalty trial in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments when it excluded mitigating evidence relating to McLain's future adaptability to prison and lack of future danger if sentenced to life imprisonment without possibility of parole.

A. Background

1. Evidence Presented to the Jury

The prosecutor introduced two basic categories of evidence at the penalty phase. First, he introduced testimony by the victims of the 1971 crimes and people involved in investigating the Solano murder to testify

about the criminal activity itself. Second, he introduced testimony suggesting that McLain was a person of bad moral character, a fair amount of which tended to portray McLain as a person who would pose a serious risk to prison administration.

One of the aggravating factors that the prosecution was able to prove was that McLain participated in an escape from a local jail in 1971. The evidence was introduced through former Deputy Russel Noragon -- the deputy who had been in charge of the jail on the night that McLain and the others escaped. Noragon testified that one evening, McLain was in a cell with two other inmates, one of whom was named Brown. Inmate Brown began banging on the bars of the cell, complaining that he had not received cleaning equipment for the cell. When Noragon opened the door to the cell to give them the cleaning materials, Brown pulled out a shank, threw Noragon against a wall, and said something to the effect of "Don't mess around. We mean business." McLain remained in the cell at first, but then he and the other inmate ran out. McLain returned and Brown ordered him to watch Noragon. McLain held Noragon with a shank, although Noragon was unable to tell whether it was the same shank and was passed by Brown to McLain or whether McLain had a second shank in addition to the one possessed by Brown. While being guarded by McLain, Noragon managed to shuffle approximately three to four feet even though McLain was holding the shank. Notwithstanding this movement, McLain did not hit, stab or injure Noragon or otherwise threaten him. McLain apologized to Noragon, stating that he did not want to participate in the escape but had been threatened and was afraid he would be killed if he refused to assist. Shortly thereafter, Brown returned, took the keys from Noragon, and tied him to another cell with sheets. Brown appeared to be the person in charge; McLain obeyed orders given by Brown. (34 R.T. 8333-39, 8368-73.)

The jury was specifically instructed that it could consider all the evidence introduced at the guilt phase during their penalty deliberations. (CALJIC 8.84.1, 7 C.T. 2081.) During the guilt phase of the case, the prosecution had introduced evidence of a "walk away" escape committed by McLain in 1981. The incident occurred during a transportation run to court. The evidence was that while the prisoners were being unloaded, McLain disembarked from the bus and ran away to a nearby parking lot where he hid near a low retaining wall. One of the deputies went to where McLain was hiding, extended his arm as if holding a weapon, and yelled "freeze". McLain immediately surrendered without resistance and came out from his hiding place on command. (27 R.T. 6470, 31 R.T. 7507.) The introduction of this evidence at the guilt phase was accompanied by a limiting instruction directing the jury to consider the evidence for purposes of consciousness of guilt only. (33 R.T. 7977.) The "consciousness of guilt" limitation apparently did not automatically transfer into the penalty phase. McLain, 46 Cal.3d at 113. In fact, the prosecutor did not confine his use of the evidence to this limited purpose.

The third "escape"-type episode came through testimony of David Hicks, a friend of McLain's during the 1969-1971 time period. Hicks testified that the last time he visited McLain in jail (in 1971), McLain wrote Hicks a note asking him to bring some hacksaw blades to the back of the jail. Hicks told McLain he was not sure he would do that and, in the end, he never did. (35 R.T. 8616-17.) McLain admitted showing Hicks the note but said that it had been written by someone else and it was just laying around the visiting room. McLain acknowledged that he did request compliance with the note, that he did want to escape, and that he did in fact escape a short time later. (37 R.T. 9340-43.)

The prosecutor also introduced evidence of a conversation between McLain and a Deputy Williams. The deputy testified about a quasi-confrontational encounter

between himself and McLain. He called McLain a "queer" one time and a week later started goading him during a transportation run. After asking McLain what made him tick, McLain said that if he was going to be blamed for burglaries and robberies, he might as well start doing them. Deputy Williams then pressed McLain for an explanation as to why he did not just commit suicide if life were so miserable. McLain said that he wanted to take a police officer out with him. McLain then said that he would not just shoot any officer at any time, but that he would shoot an officer if stopped after having committed a crime. Deputy Williams asked if McLain would shoot him. McLain said he would shoot Deputy Williams at any time, even if he were not returning from a crime. Deputy Williams testified that McLain appeared by the questioning and attributed the intimidating comments to his having called McLain a queer the week before. (34 R.T. 8396-8407.)

The prosecution immediately followed this evidence with testimony by a Deputy Zermeno who said that when transporting McLain one day, after opening the door, he told McLain not to escape. McLain responded that he would escape as soon as he mastered the handcuff key and that the next time would not be non-violent. (34 R.T. 8408-09, as corrected 37 R.T. 9379-80.)

The prosecution also introduced into evidence a letter that McLain wrote to his niece Mary Rich. The California Supreme Court ruled that nothing in the letter was admissible. Near the conclusion of the letter, McLain wrote that he had tried to do good in the past and had failed, so the "next time I get out I'll not try to do right." The introduction of this letter was preceded by a limiting instruction directing the jury not to consider the letter for purposes of inferring future conduct. (35 R.T. 8724-27.)

During cross-examination, the prosecutor elicited from McLain's former jailhouse colleague that McLain had been caught with, and pled guilty to possessing, illegal homemade knives while in prison. (35 R.T. 8974-77.)

2. Evidence Excluded from the Trial

The prosecution filed a motion in limine to exclude the anticipated testimony of Dr. Dean Clair. (7 C.T. 2052.) Dr. Clair was a prison staff psychologist who had treated McLain. As revealed on voir dire, Dr. Clair had met with McLain and reviewed many of McLain's prison records during the time period 1972 to 1979 with the majority focusing on the time before 1976. (35 R.T. 8792, 8794.) After interviewing McLain and reviewing his prison records, Dr. Clair was prepared to testify that, based on McLain's personality and his past performance in prison, McLain was likely to adjust well to prison and would not pose a danger to prison staff or other inmates even if incarcerated for life.

The trial judge held a hearing off the record and in chambers where he indicated that the evidence would be excluded. (35 R.T. 8716:2-3.) As a result, the details of Dr. Clair's proposed testimony is not entirely clear. Nonetheless, Dr. Clair had testified at the Solano penalty trial and the prosecution conceded that his testimony would be similar to what he testified to previously. The trial judge was later offered a copy of Dr. Clair's Solano testimony. (35 R.T. 8717:16-20.)

The state court interpreted the ambiguous record as containing an offer of proof that mirrored the language of Skipper, 476 U.S. 1, to wit, that McLain "would not pose a danger if spared (but incarcerated)." McLain, 46 Cal.3d at 109. The Court finds that Dr. Clair was prepared to testify that McLain would have adapted well to life in prison and would likely pose no threat to fellow inmates or prison staff in the future.

The trial judge ruled that all testimony relating to future adaptability to prison would be excluded:

> [I]t seems to me it would then be inappropriate for the defense to show the unlikelihood of committing future crimes in or out of prison. [P] So, in answer to your inquiry, the Court would not permit the doctor

to express an opinion as to Mr. McLain's future conduct in prison.

(35 R.T. 8717:9-15.)

3. Argument Relating to McLain's Potential for Adjusting to Prison

The prosecutor's closing argument focused on three main themes in suggesting that McLain's long term incarceration would pose a threat to prison security. He pointed to McLain's actual prison history. This included only a few isolated instances of misconduct, but was aggravated by comments McLain made about shooting police officers. He pointed to two escapes that McLain had been involved in -- one a "walk away" escape and the other one in which McLain took an active, but clearly subordinate and allegedly coerced role -- and reinforced their severity by relying on a comment that he would escape again combined with an implicit threat that it would involve violence. He then followed this up by noting McLain's comment to his niece that he intended to do worse in the future. Combining these episodes, the prosecutor was able to strongly suggest that each of these instances indicated that McLain would in fact pose a serious threat to prison administration.

As to the first strand of argument, the prosecutor did not heavily emphasize McLain's actual history inside prison. Rather, he relied more heavily on anecdotal evidence of comments by McLain himself as suggesting that he was a serious risk in prison. The prosecutor transformed McLain's comments into concrete threats by relating them to actual incidents. For example, he commenced the discussion of the danger McLain posed as an inmate by talking about the prison records that were actually introduced into evidence, highlighting that they reflected some instances of misconduct -- including knife possession (as were used in the 1971 escape) -- and also

indicated that McLain had sometimes displayed a bad attitude and, therefore, had obviously not adjusted well:

> Now, obviously, you can go through a long list of prison records, such as a person who's been incarcerated this long would have accumulated, and pull out a few strands that are favorable, but I think, in summation, it's apparent that the defendant was far from a model prisoner. He had some illegal homemade knives in his cell; he was convicted of that. Some people rated him as an above-average worker; other times he was rated unsatisfactory in his attitude and work habits. He didn't participate in self-help programs, and he was described in the personality evaluation in 1978 as hostile, guarded, defensive, negative, suspicious, and defiant.
>
> Now, isn't that pretty much what you would expect? That's really pretty much consistent with the personality profile that Dr. Evans gave you as a defense witness, and it's certainly consistent, I think, with what you come to see and know about the defendant from having heard him testify ...

(R.T.Aug. 21:11-22:7.)

Having suggested that McLain was a general risk in prison, the prosecutor moved to identifying specific evidence that he contended indicated that McLain was in fact dangerous. He started by capitalizing on the testimony from Deputy Williams that McLain had stated that he would shoot a police officer if captured during any criminal activity. (R.T.Aug. 28:17-29:17.) Having strongly suggested that McLain was generally a dangerous individual, the prosecutor then moved to McLain's escape incident in 1971 with Deputy Noragon and the recent walk-away escape -- aggravating the severity of both by connecting them to his comment to Deputy Zermeno -- reinforcing that McLain posed an actual, serious risk of danger if incarcerated:

> And he informed Ralph [Zermeno] rather casually, "The next time I escape it's not going to be

> nonviolent." And we know that the defendant has a history of successful escapes. He escaped in 1971, as you heard from Russ [Noragon]; and of course, commensurate with his pattern of blaming everything on somebody else, he informed [Noragon] that, "Well, I'm only doing this because this other guy made me do it and they would kill me if I didn't," because he doesn't want to take any responsibility for himself.

(R.T.Aug. 29:18-26.)

The seriousness of these two intertwined escape references was then buttressed by the note he wrote to Hicks (seeking Hicks' assistance in enabling McLain to escape) and reinforced both by the comment made to Zermeno and by suggesting McLain had a general negative disposition. (R.T.Aug. 29:18-30:11.) The prosecutor concluded by emphasizing:

> And as you know, he escaped in January of this year, and he told [Zermeno] that he was going to do it again, only next time it won't be nonviolent. His whole attitude is one of violence, committing crimes, committing crimes whenever it suits his purposes, lying without batting an eyelash, and a lack of remorse for anything he does.

(R.T.Aug. 29:18-30:11.)

To bring home his point that McLain would always pose a constant danger so long as he remained alive, the prosecutor also used the letter McLain wrote to his niece Mary Rich -- where he had stated "I tried to do good while I was out there but the next time I get out I'll not try to do right." (35 R.T. 8724-27.) Although he prefaced his remarks by cautioning against using the note as a basis for predicting future violence, he nonetheless strongly suggested that it was relevant for that very purpose. (R.T.Aug. 27:11-26.) Kossoris then reinforced the importance of the Mary Rich letter at the end of his opening summation as well, rhetorically asking:

> What other appropriate penalty can there be, when you consider the law and the evidence, for someone

who commits robberies, rapes, burglaries, kidnappings, child molestings, and then brags about it, is proud of it and says that if he could get out again, he wouldn't try to do right the next time?

(R.T.Aug. 38:16-20.)

The jury could not help but understand the prosecution's implicit connection between an attitude toward future misconduct and past misbehavior while in prison. On rebuttal, Kossoris again reminded the jury of the threat that McLain posed if imprisoned:

It was claimed by Mr. Eskin there's no evidence of a violent escape. Well, I don't know what you call the 1971 escape. Seems to me it was pretty obvious that that was an escape by force and violence, that a number of people were involved, or, to be exact, that force was used, that a shank was used. The defendant held one Mr. [Noragon], the witness who testified, and we are talking about the fact that you have to prove another crime beyond a reasonable doubt. I think the evidence on that is undisputed.

The defendant on the stand himself admitted he escaped. And we know that he wanted to escape before then.

(R.T.Aug. 82:20-83:3.)

Responding to the defense's argument that McLain never had an opportunity to fully develop and be socialized because he had spent so much time incarcerated, the prosecution again touched upon McLain's prior misconduct while incarcerated:

Mr. McLain has been in custody because of his own misdeeds, and he hardly should be heard to come in and say, "Well, gee, I just haven't had a chance because every time I get out, I go out and commit a new crime and I'm right back in custody." And even in custody, you know, that he's committed crimes, illegal possession of a homemade knife in prison, illegal escapes, so he hardly deserves any kind of leniency or benefit because of his own misdeeds.

(R.T.Aug. 75:9-16.)

In order to minimize the import of the defense's mitigating evidence regarding McLain's deprived childhood, Kossoris contrasted it with the aggravating nature of McLain's current disposition and lack of future redemption by tying in both the comments to Deputy Williams about shooting an officer and McLain's letter to his niece. (R.T.Aug. 83:22-84:7.)

McLain's response to these arguments was dependent on the jury's accepting the factual description provided by Lonnie Chatman and the opinion testimony given by Dr. Evans. In order to argue that McLain was a benefit to the prison administration, Pell had to rely on Chatman's testimony -- the jail colleague who affirmed that he drafted the mysterious affidavit but could not remember a thing about its contents. Moreover, the extent of Chatman's testimony was simply that "Robert Cruz McLain in prison is a quiet, shy, introverted person who gets along basically with his co-workers and the general population. Robert McLain is a good guy to have around. He's going to give you his money; he's going to try to protect you." (R.T.Aug. 100:3-13.)

Pell addressed Dr. Evans' comments relating to McLain's adaptability to prison, but -- as he promised the trial judge -- he steered well clear of any predictions about any future danger McLain might pose and did not address Kossoris' comments about illegal activity in any way. (R.T.Aug. 108:27-109:8.) Pell again relied on Chatman's testimony to suggest that McLain had adapted well to prison. Again, however, he was able to come up with nothing more than that "[McLain] helped others and paid for the debts ... [and] stopped pressure from being put on people." (R.T.Aug. 112:11-13.) Pell added his own interpretation of McLain's behavior -- the interpretation that he was prohibited from having a genuine psychological expert provide to the jury. (R.T.Aug. 112:13-113:3.)

4. The State Supreme Court's Ruling

The state court ruled that the absence of Dr. Clair's testimony regarding past behavior was a result of the defendant's decision, not the trial court's order, but recognized that the trial court improperly excluded Dr. Clair's testimony regarding McLain's future behavior in prison. McLain, 46 Cal.3d at 108-09. The state court dismissed the severity of the error in two sentences, concluding that the aggravating evidence was too substantial to be outweighed by any mitigation.

B. Overview of the Eighth Amendment's Procedural Requirements

1. The Right to Introduce All Mitigating Evidence

Beginning with Lockett v. Ohio, 438 U.S. 586 (1978), the Supreme Court has repeated time and again that "'the sentencer [must] ... not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" Skipper, 476 U.S. at 4, quoting Eddings v. Oklahoma, 455 U.S. 104, 110 (1982), quoting Lockett, 438 U.S. 586, 604 (1978) (plurality) (emphasis original).

In Lockett the Supreme Court held that a capital sentencer had to be permitted to consider "as a mitigating factor" whether the defendant lacked a specific intent to kill, the degree of the defendant's participation in the capital offense, and other aspects of the defendant such as his age, character, or lack of a prior record. Lockett, 438 U.S. at 597, 604 (plurality). In Eddings, a majority of the Supreme Court adopted the principle and applied it to evidence of a young defendant's claimed mitigation stemming from a troubled family background including beatings by a harsh father and emotional disturbance.

Eddings, 455 U.S. 104, 113-14 (1982). In Penry, 492 U.S. 302, the Court applied the rule to evidence of a defendant's mental retardation and abused background. Penry, 492 U.S. at 328. And in Skipper, the Court applied this general rule to "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison," Skipper, 476 U.S. at 7, also described as "evidence that the defendant would not pose a danger if spared (but incarcerated)." Id., at 5.

2. Due Process Right to Rebut Aggravating Evidence

In Gardner v. Florida, 430 U.S. 349, the Supreme Court held that a death sentence could not constitutionally be based on evidence that the defendant was precluded from rebutting. Faced with a Florida practice of preparing confidential pre-sentence reports that were submitted to the judge before sentencing but which were not available to the defendant, the Court held that it was a violation of due process to implement a sentence of death "on the basis of information which [the defendant] had no opportunity to deny or explain." Gardner, 430 U.S. at 362.

In Skipper, the Court confirmed that this rule was not limited to instances where the evidence was simply not disclosed. Rather, it was equally applicable to situations where the defendant was precluded from rebutting the information. Skipper's main holding -- the one premised on the Lockett- Eddings principle -- commanded a six-justice majority. On the due process issue, however, the Supreme Court was unanimous. The majority confirmed:

> The relevance of evidence of probable future conduct in prison ... is underscored in this particular case by the prosecutor's closing argument, which urged the jury to return a sentence of death in part because petitioner could not be trusted to behave if he were simply returned to prison. Where the prosecution specifically relies on a prediction of future

> dangerousness in asking for the death penalty, it is not only the rule of Lockett and Eddings that requires that the defendant be afforded an opportunity to introduce evidence on this point; it is also the elemental due process requirement that a defendant not be sentenced to death "on the basis of information which he had no opportunity to deny or explain."

Skipper, 476 U.S. at 5 n.1, quoting Gardner, 430 U.S. at 362.

The three-justice concurring opinion expressed complete agreement. Id., at 9-11 (Powell, J., concurring, joined by Burger, C.J., and Rehnquist, J.).

The prosecution in Skipper elicited evidence that, after he was initially arrested, the defendant began violently kicking the bars of the jail cell. The prosecutor highlighted this evidence in arguing that Skipper was likely to be a violent prisoner. In response to the defendant's statement to his wife that he had been raped in prison, the prosecutor argued that this was probably a reversal of the truth -- i.e., that Skipper himself had raped someone else. Skipper, 476 U.S. at 9-10 & n.1 (Powell, J., concurring). The proffered testimony was through two prison guards and a visitor, "all of whom would have testified that [defendant] had behaved well while in prison awaiting trial." Id., at 10 (Powell, J., concurring).

Justice Powell explained that excluding the proposed testimony was error because it "would [have] undermine[d] this line of argument." Skipper, 476 U.S. at 10 (Powell, J., concurring). The concurring justices also noted that the error "was aggravated by the prosecution's closing argument, which emphasized and exaggerated petitioner's misconduct in prison after his arrest." Id., at 11 (Powell, J., concurring).

Just last Term, the Supreme Court again reaffirmed the significant due process aspect of Skipper: "where the prosecution relies on a prediction of future dangerousness in requesting the death penalty, elemental due process

principles operate to require admission of the defendant's relevant evidence in rebuttal." Simmons v. South Carolina, 114 S. Ct. 2187, 2194 (1994) (plurality), id. at 2200 (O'Connor, J., concurring).

C. Application to McLain's Challenges Herein

1. Eighth Amendment Violation

a. Constitutional Error

The California Supreme Court found that the exclusion of Dr. Clair's testimony regarding McLain's future adaptability to prison clearly violated Skipper. The Attorney General does not directly contest this other than to point out that the state court's language was that the ruling "may have been erroneous under Skipper." There can be no legitimate debate here. It clearly was error: "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination." Id., 476 U.S. at 7. Any distinction between past and future behavior was firmly rejected. Id. at 7.

The only issue is prejudice.

b. Eighth Amendment Prejudice Analysis

McLain suggests that Skipper is tested by an extremely lenient standard of prejudice: a "harmful under any standard" standard. This, he argues, is akin to per se reversible error.[4] In so doing, McLain clearly takes Skipper's language out of its intended context.

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4. The Attorney General has lent no assistance here. Ignoring McLain's argument that the error is reversible per se, he simply argues that there is no prejudice under a deferential standard.

McLain is correct that Skipper was derived from the rule of Lockett and Eddings. He is also correct that neither Lockett nor Eddings applied any sort of harmless error analysis. Lockett, 438 U.S. at 608 ("The limited range of mitigating circumstances which may be considered by the sentencer under the Ohio statute is incompatible with the Eighth and Fourteenth Amendments.... Accordingly, the judgment is reversed."), Eddings, 455 U.S. at 117 ("[T]he state courts must consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances. We do not weigh the evidence for them. Accordingly, the judgment is reversed.").

McLain is also correct in noting that other Supreme Court decisions based on violations of the Lockett-Eddings rule did not consider harmlessness. Penry, 492 U.S. at 328 ("Our reasoning in Lockett and Eddings thus compels a remand for resentencing so that we do not 'risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.' 'When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.'"). While citing to Hitchcock v. Dugger, 481 U.S. 393 (1987), as another example, however, he overlooks that the Supreme Court specifically noted therein that "Respondent [Warden] has made no attempt to argue that this error was harmless, or that it had no effect on the jury or the sentencing judge." Hitchcock, 481 U.S. at 399. Hitchcock further added that "[i]n the absence of such a showing [of harmlessness] our cases hold that the exclusion of mitigating evidence of the sort at issue here renders the death sentence invalid," id., 481 U.S. at 399, thereby expressing a tacit assumption that harmless error analysis might well be appropriate.

The most closely analogous case, however, is clearly Skipper. Skipper undeniably engaged in some sort of harmless error analysis. Id., 476 U.S. at 8. The Court clearly explained:

> Nor can we confidently conclude that credible evidence that petitioner was a good prisoner would have had no effect upon the jury's deliberations. The prosecutor himself, in closing argument, made much of the dangers petitioner would pose if sentenced to prison, and went so far as to assert that petitioner could be expected to rape other inmates. Under these circumstances, it appears reasonably likely that the exclusion of evidence bearing upon petitioner's behavior in jail (and hence, upon his likely future behavior in prison) may have affected the jury's decision to impose the death sentence. Thus, under any standard, the exclusion was sufficiently prejudicial to constitute reversible error.

Skipper, 476 U.S. at 8.

To be sure, this analysis came in response to the State's suggestion that the proposed evidence would have been cumulative. At most, however, that suggests that the scope of the harmless error inquiry may be limited to determining whether the mitigating factor was in fact adequately presented and considered. McLain suggests no other sound basis for distinguishing Skipper from Lockett, Eddings, and Penry.

In any event, it is clear that Skipper engaged in some sort of harmless error analysis. And its reference to harmlessness "under any standard" is most easily understood as the Court's conclusion that the appropriate standard of harmless error review did not need to be decided since, under any standard selected, the judgment in Skipper would inevitably have been reversed.

In light of Skipper's quasi-harmless error inquiry and the fact that the holding in Skipper rested in significant part on the evidence and arguments asserted by the prosecution, the Court's assessment of the prejudice flowing from the Eighth Amendment error will be consolidated with its assessment of prejudice arising from this claim's due process dimensions.

2. Fifth and Sixth Amendment Violations

The state supreme court did not specifically address the due process implications raised by the trial court's exclusion of Dr. Clair's testimony. Nonetheless, it was raised on appeal, thereby exhausting the issue. Smith v. Digmon, 434 U.S. 332, 333-34 (1978). It has been raised again here and the Attorney General has failed to raise any valid procedural defense. This Court is required to review the claim on the merits.

Again, the Attorney General does not dispute that the exclusion violated ordinary due process principles. Notwithstanding the tacit concession, it is necessary to review why it was a due process violation in order to assess the resulting harm.

In significant part, although not entirely, the due process nature of the Skipper violation arises from much of the evidence that was improperly admitted and is the subject of Claim XIV. As noted above, the prosecutor introduced a substantial volume of evidence indicating that McLain would be a constant danger without regard to whether he was in a structured prison environment.

The prosecutor not only introduced evidence of one escape, but he also connected it to other episodes, some highly inflammatory, to magnify the escape's significance. He argued that the note McLain wrote to David Hicks showed that the escape was in fact pre-planned and that McLain was a voluntary participant. He called Deputy Zermeno, who testified that McLain told him that he would one day escape again -- once he mastered the key to the handcuffs -- and that his future escape would not be non-violent. Kossoris was able to tie the threat to jail personnel through the testimony of Deputy Williams who testified that McLain had told him that he (McLain) would be willing to shoot a police officer if he were participating or returning from participating in a crime. Although the comment was directly tied to burglaries and robberies only, Kossoris did not have to reach far to imply

that McLain would do so during a violent escape attempt either. (R.T.Aug. 29:9-11: "He -- without batting an eyelash -- would shoot or kill anyone if he felt like doing it or had any incentive to do it.") Further, through cross-examining Chatman, Kossoris was able to elicit that McLain had been convicted of possessing illegal knives while in prison.

The prosecution reinforced McLain's danger in prison by heavily emphasizing McLain's general dangerousness at all times. The prosecutor elicited information about McLain's constant ruminations on rape, his general desire to commit rape, and how that was consistent with his comments about committing a rape in a church bathroom and inviting someone to commit a rape in Santa Barbara. He also introduced evidence of prior incidents where McLain would be sitting in his parked car and, sometimes when a woman walked by, get out of the car and walk in her direction, taking his sunglasses with him, even at night. In light of other testimony that McLain wore sunglasses to hinder being identified and wore tennis shoes because they were quieter, the obvious inference was that McLain was a constant sexual predator who posed a constant and continuous danger to others.

This concern over McLain's future conduct was only heightened by the use of the letter to his niece and another comment to Deputy Williams. To his niece, McLain wrote that he would not try to do good again. To Deputy Williams, McLain said that since he was being blamed for crimes, he might as well be committing them. All of these themes were prominently featured in the prosecution's closing argument.

Indeed, the prosecution not only highlighted the significance of this evidence for its ordinary purposes, but was not the least bit subtle in suggesting that McLain would clearly pose a threat to prison security:

> Now, obviously, you can go through a long list of prison records, such as a person who's been incarcerated this long would have accumulated, and

pull out a few strands that are favorable, but I think, in summation, it's apparent that the defendant was far from a model prisoner.

(R.T.Aug. 21:18-22.)

In his final summation, Kossoris again reminded the jury: "And even in custody, you know, that he's committed crimes, illegal possession of a homemade knife in prison, illegal escapes, so he hardly deserves any kind of leniency or benefit because of his own misdeeds." (R.T.Aug. 75:9-16; see also R.T.Aug. 21:22-24.)

All of this evidence strongly reinforced the prosecution's contentions that McLain "could not be trusted to behave if simply returned to prison" -- rather, he would clearly pose a risk of danger. Skipper, 476 U.S. at 5 n.1. In a case such as this, "elemental due process principles operate to require admission of the defendant's relevant evidence in rebuttal." Simmons, 114 S. Ct. at 2194.

The Court made clear in Skipper that the proposed rebuttal is not confined to narrowly tailored disputes limited to the specific events offered by the prosecutor. In Skipper, the prosecutor elicited evidence that the defendant had been violently kicking the bars to the jail cell after being arrested. The defendant introduced testimony that he had been raped in prison, but in closing argument, the prosecutor argued that the defendant was probably the aggressor in light of his prior convictions for sexual assault and stocky physique. Skipper, 476 U.S. at 9-10 (Powell, J., concurring).

The Supreme Court did not find constitutional error based upon excluded evidence related to the bar-kicking or rape incident. Rather, the Court concluded that the evidence addressed the general issue of the defendant's dangerousness in prison and that he should have been permitted to fully develop this area. His offer of proof had been from two prison guards and a "regular visitor" who were prepared to testify that the defendant "had behaved

well while in prison awaiting trial." Skipper, 476 U.S. at 10 (Powell, J., concurring).

Here, McLain proffered Dr. Clair, who had met with McLain on several occasions and who had reviewed a substantial portion of McLain's recent prison records. Dr. Clair was a staff psychologist for the California Department of Corrections and was prepared to testify that McLain had made a positive adjustment toward prison in the past and, more importantly, (interpolating forward) was not only likely to make a positive adjustment to the structured environment of prison life, but also would not pose a risk of harm to the custodial staff or fellow inmates. (35 R.T. 8792, 8794.) In view of the breadth of topics considered open by Skipper, McLain must have had not only an Eighth Amendment right to present this evidence at the outset, but also, in light of the prosecution evidence and argument, a due process right under the Fifth Amendment to introduce evidence on his general prospects for future non-dangerousness while in prison.

3. Prejudice

a. Standard for Determining Prejudice

Anticipating the inevitable, the Attorney General wisely focuses upon the harm caused by the trial court's erroneous ruling. For the reasons expressed in sub- Part C.1.b., above, a harmless error review -- at least one similar to the one undertaken in Skipper -- is necessary. As noted above, the trial court in Skipper had precluded testimony by two prison guards and a "regular visitor" who offered to testify that the defendant had behaved well during his pre-trial incarceration and was not likely to pose a threat to prison personnel. Among the arguments raised for affirmance, the State argued that excluding the proposed testimony was harmless since it was cumulative to testimony by the defendant himself and his former wife,

both of whom testified that he had conducted himself well during that time period. Skipper, 476 U.S. at 3.

The Supreme Court rejected this suggestion, noting that "evidence of adjustability to life in prison unquestionably goes to a feature of the defendant's character that is highly relevant to a sentencing jury's determination," Skipper, 476 U.S. at 7 n.2, and that, in Skipper's case, the additional testimony could not be dismissed as likely to have only a marginal impact beyond his own and his former wife's testimony. The Court explained:

> [C]haracterizing the excluded evidence as cumulative and its exclusion as harmless is implausible on the facts before us. The evidence petitioner was allowed to present on the issue of his conduct in jail was the sort of evidence that a jury naturally would tend to discount as self-serving. The testimony of more disinterested witnesses -- and, in particular, of jailers who would have had no particular reason to be favorably predisposed toward one of their charges -- would quite naturally be given much greater weight by the jury.

Skipper, 476 U.S. at 8.

Further, the Court found that not only would the evidence not be cumulative, but in the case before it, the evidence addressed an issue that was not insignificant at trial. As discussed above, the Court found significant the fact that the prosecutor had strenuously criticized the defendant's conduct in jail. Skipper, 476 U.S. at 8.

Since this case is on collateral review, unless this error is deemed a structural defect in the trial process, cf. Lockett, 438 U.S. at 608, Eddings, 455 U.S. at 117, the appropriate standard is whether the error "had a substantial and injurious effect or influence in determining the jury's verdict." Brecht, 113 S. Ct. at 1722. The conclusion of whether an error was "harmless[] is a mixed question of fact and law" and therefore considered de novo. Suniga, 998 F.2d at 667.

b. Applying the Prejudice Test

(1) The "Right" to Rely on "Past" Adjustment

The Attorney General first notes that Dr. Clair was permitted to testify about McLain's past prison behavior. This is interesting, though slightly inaccurate. Ultimately, however, it fails to address the question at issue. Skipper plainly rejected any past/future dichotomy. Id., 476 U.S. at 6-7 ("the precise meaning and practical significance of ... the State's argument is difficult to assess.")

The trial court neither ruled that Dr. Clair could nor could not testify to McLain's past prison history. The state supreme court did not say otherwise. As explained by the state supreme court, the trial court made no definitive order whatsoever. McLain, 46 Cal.3d at 108.

The appellate court's interpretation of the lower court's order is a factual question which is presumed correct. Parker v. Dugger, 498 U.S. 308, 320 (1991). This conclusion appears incontestable and neither side has presented argument or evidence suggesting that this finding is not "fairly supported by the record." Id.

Nonetheless, whatever topics Dr. Clair might have been allowed to testify about, McLain's general "adaptability" to prison was clearly not among them. Once Dr. Evans began to address McLain's general "ability to adapt," it soon became apparent that the topic could not be restricted simply to "the past." Both Pell and Kossoris recognized that Dr. Evans' brief comments abutted this area and fell within the scope of the trial court's prohibition. The trial judge did not disagree. The California Supreme Court recognized that the trial court's ruling violated Skipper, 476 U.S. 1. Now, in these federal habeas corpus proceedings, no one seriously disputes that the trial court's intended ruling excluded evidence specifically held admissible under Skipper and Lockett.

The bare admissibility of the prison records themselves was not an adequate substitute. Evidence that McLain had behaved well in the past could lead to an inference that he would behave well in the future. This would not, however, directly rebut the evidence that he had expressly threatened to escape in the future, to do so violently, and would not try to do good if allowed back in to society. Furthermore, even if he had in fact "adapted" in the past, during finite prison terms, the bare adaptation itself would not refute the concern that such adjustment may have been contrary to McLain's inner nature and not a conversion that McLain could maintain for the rest of his life.

As emphasized by Skipper, the mitigating nature of this evidence depends on whether the defendant will be able to adjust to life incarceration in the future. It is not a reward for having behaved well in the past. Skipper, 476 U.S. at 7. Nowhere in his Fifteenth Claim for Relief nor in his supporting memorandum of points and authorities does McLain even remotely suggest that the trial court erroneously excluded mitigating evidence related to McLain's past prison conduct. (3rd Amd.Ptn, P 49, pp.58-60.) He complains squarely and directly that the trial court improperly excluded a psychologist's important opinion testimony as to the likelihood that McLain would pose a threat in the future.

While this undeniably would have been accomplished in part through reliance on McLain's prior records, he attempted to present more than simply Dr. Clair's regurgitation of the contents of the records (which, as the prosecutor noted, was arguably inadmissible hearsay). And in fact Lockett and Eddings, as explained in Skipper, entitled him to do more than simply have his prior prison behavior rated as good, bad, or somewhere in between. He was entitled to have Dr. Clair opine -- based on those records, his interviews, and his diagnosis of McLain -- that McLain was the type of person who would likely pose few problems to the staff and fellow inmates while imprisoned,

even if incarcerated for the rest of his life. At most, the trial court was willing to allow Dr. Clair to rate the quality of McLain's prior behavior while incarcerated for a seven-year term. Evidence that said no more than that McLain behaved admirably during a finite prison term would carry some, but little comparatively weight in the minds of jurors who were asked to predict how McLain would react if he were incarcerated under a sentence from which he knew he would never be released. This is far less than he was constitutionally entitled to do by Skipper and, on the facts of this case, no adequate substitute.

McLain's prison history was lengthy but, apparently, more positive than not. He was, nonetheless, in prison and he was there because of repeated acts of offensive criminal conduct. McLain's attorneys could not possibly be expected to argue that his past behavior itself justified a life sentence. To maintain any sort of credibility, McLain's attorneys had to acknowledge, as they did, that McLain's conduct was outrageous when he was permitted to roam through society. (R.T.Aug. 49-50, 108-09.) One of their most important defenses was to convince the jury that he would not pose the same threat if incarcerated, even if he knew he was to be incarcerated for life. The focus, the only one feasible, had to be on the future -- what risk McLain would pose if not sentenced to death but allowed to live, albeit in prison. For this, they could not rest merely on a recitation of McLain's prison records or on a penologist to characterize his past behavior as "not bad -- for someone in prison." To rise to the level of the mitigation contemplated under Skipper, the witness had to be able to provide a basis for concluding McLain "would not pose a danger if spared (but incarcerated)." Skipper, 476 U.S. at 5.

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(2) The Level of Aggravation Proved at Trial

The Attorney General next lists the evidence presented in the prosecution's penalty phase case in chief and summarily concludes that the aggravation was overwhelming, the mitigation virtually non-existent, and (implicitly) a death sentence nearly inescapable.

Somewhat disingenuously, the Attorney General includes in the summary of "overwhelming aggravation" the evidence that the state supreme court held was irrelevant to any of the sentencing factors. (Supplemental Briefing in Support of Answer, etc., Oct. 4, 1993, at 110:18-26 (Deputy Williams: shooting police), 112:23-113:21 (Hicks: rape in Santa Barbara, escape note), 114:26-117:21 (Forbes: general desire to commit rape, church bathroom; Mary Rich letter: future threat).) The Court agrees that the aggravating evidence in this case was substantial. Aside from the improperly admitted evidence regarding McLain's frequent outlandish comments and in addition to his lengthy criminal record, the most significant aggravating evidence was his return to Ventura to attack a former victim. Although there were clearly many strong aggravating aspects to this case, the Supreme Court has "plainly rejected the submission that a particular set of facts surrounding a murder, however shocking they might be, were enough themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty." Maynard v. Cartwright, 486 U.S. 356, 363 (1988).

Unlike the aggravating evidence which the Attorney General listed in detail, his papers make no reference to any of the mitigating evidence presented at the trial. His summary dismissal of it as minimal does not make it so. While the prosecutor took pains to minimize the impact of the evidence regarding McLain's family background, he never questioned its veracity or its significance. He also

did well in attempting to cast the psychologist's testimony in a light as favorable as possible for his position.

In the end, however, there really were no significant factual issues for the jury to resolve. The prior convictions were not seriously impeached. Except for the testimony of fellow inmate Chatman, McLain's mitigating evidence -- that he suffered a seriously deprived and abusive childhood and was currently diagnosed as being emotionally immature and suffering from several personality disorders -- was not significantly undermined either. The only issue the jury had to determine was whether death was the appropriate penalty. The Attorney General's contention that the mitigating evidence was de minimis is belied by the extended length of the jury's deliberations. Indeed, even the trial judge who heard all the evidence concluded that mitigating evidence presented was significant and not insubstantial:

> [T]he Court has considered the totality of the defendant's background, his education, his early childhood, lack of parental figures, child abuse suffered in his formative years, minimal education, poverty, and has concluded that all of these factors in the Court's opinion constitute a circumstance in mitigation. The Court notes that these factors, too, contribute to the present personality disorders that he suffers.

(37 R.T. 9478:3-10.)

Had the jury found the mitigating evidence to be as insubstantial as the prosecutor characterized it -- nothing more than having been "nice" on a couple of occasions and not criminally assaulting a recent female companion -- or as minimal as the Attorney General now asserts it was, the jury would surely not have deliberated for nearly three days in order to reach a penalty verdict after a comparatively brief 5 1/2 -day penalty trial (and a different jury would not have unanimously recommended life). Compare Hamilton v. Vasquez, 17 F.3d at 1163, with People v. Howard, 1 Cal.4th 1132, 1184, 5 Cal. Rptr. 2d

268 (1992) (47 minutes; no penalty evidence), People v. Gallego, 52 Cal.3d 115, 158, 276 Cal. Rptr. 679 (1990) (2 1/2 hours; six-month guilt/penalty trial), People v. Ramos, 37 Cal.3d 136, 145, 207 Cal. Rptr. 800 (1984) (three hours). There were no factual issues that were seriously disputed in the penalty trial. Virtually the entirety of the jury's task was to decide the appropriate penalty.

In any event, the Attorney General's argument -- simply relying on the aggravating evidence presented -- is flatly inconsistent with the Supreme Court's prior decisions in Lockett, Eddings, Penry and the limited harmless error analysis conducted in Skipper. The Supreme Court has recognized that the type of evidence sought to be introduced through Dr. Clair is "highly relevant to a jury's sentencing determination." Skipper, 476 U.S. at 7 n.2. It would be error to conclude, as the Attorney General does, that simply because the only information McLain was allowed to present the first time was insubstantial (in the eyes of the Attorney General), that the jury would not have been persuaded by the addition of substantial mitigating evidence.

(3) The Issue Was Significant

Furthermore, as underscored by the Supreme Court, the issue was spotlighted so conspicuously for the jury that the exclusion of this evidence could not have had only a marginal impact. The prosecution's evidence regarding McLain's prison conduct was both "emphasized and exaggerated." Skipper, 476 U.S. at 11 (Powell, J., concurring). Much of the evidence suggesting a future threat of danger was based more on McLain's comments than on his actual actions in prison. The only episode of significant prison misconduct was his participation in an escape in 1971. Yet even that episode was substantially mitigated by the role he played in the offense, as reinforced not simply by his own self-serving comment to Deputy Noragon, but more importantly by Deputy

Noragon's objective description of McLain's actions as clearly playing a follower's role, in obeying orders but not initiating any violence toward Noragon, and in clearly allowing Noragon to engage in substantial maneuvering so that he could move several feet to be able to see outside the cell without encountering any resistance from McLain.

The aggravation of this episode came through McLain's combative comments to others 10 years later -- i.e., his statement about shooting police and engaging in a violent escape in the future -- and in the note he wrote to Hicks requesting assistance in carrying out a non-violent escape. The issue of escaping was mentioned so frequently that the jury simply could not have ignored it. The exclusion of affirmative evidence from a trained mental health professional (who had both interviewed McLain and reviewed his records) that McLain was likely to pose no future danger while in prison clearly hindered McLain's ability to rebut the prosecution's arguments regarding the threat that McLain allegedly posed to the prison authorities.

(4) The Proposed Evidence Would Have Been Substantial and Not Cumulative

The Attorney General next asserts that Dr. Clair's testimony would have been insubstantial. On direct appeal, the state court treated the offer of proof as tendering mitigation evidence that was of the type addressed in Skipper. By definition, such evidence would have been substantial. Since the argument was conducted off the record and neither side tenders evidence refuting the appellate court's finding, it is difficult to question this conclusion.

Finally, the Attorney General addresses the most substantial of his arguments -- that McLain actually had a sufficient opportunity to, and did in fact, present evidence to rebut the inferences of future danger. He argues, primarily, that Dr. Evans' testimony sufficiently covered

the topic, implying that Dr. Clair's testimony would therefore be cumulative.

Although superficially enticing, this argument is also unavailing. Dr. Evans did in fact refer to McLain's general adaptability to prison, suggesting that McLain would adapt well in the future. But these were nothing more than two isolated comments, somewhat at odds with other portions of his testimony, buried in the context of other statements, and which the defense was specifically prohibited from arguing to the jury. Further, Dr. Clair was a far superior source, both in terms of his professional experience and the information on which his opinion was based.

Dr. Evans first opined that, when incarcerated, McLain was likely to have become "irritable," "depressed," and "less patient." On Pell's questioning, he specifically related such reactions to jails such as the one from which McLain escaped in 1971. (37 R.T. 9252.) On further prodding, Dr. Evans changed course and opined that, during a longer prison term, McLain would likely be more adaptable to the structured environment since he would be kept engaged relatively constantly.

Significantly, not only did Kossoris highlight that Dr. Evans' diagnosis was based entirely on McLain's uncorroborated remarks, but Dr. Evans' brief comments themselves all but confirmed that he was not "assessing" or "predicting" McLain's behavior as much as parroting back McLain's own statements:

> For example, he said to me one day when we were talking that he preferred working at night because he would stay out of trouble. If he wasn't free to travel and go out and do things in the evening, if he was busy with a job, that he would stay out of trouble. He has given -- made other references to this sort of thing that if he were in some place where his life was structured and the structure of things made it difficult for him to operate freely, things would go better. So, in prison, things are pretty structured and I would imagine that he would be able to be active, being

> able to become involved in work or hobbies or activities and the time would go by quickly and he would adjust very well.
> (37 R.T. 9254:15-27.)[5]

While it is somewhat odd that the doctor's opinion would appear to be nothing more than a repetition of what McLain had told him, it is hardly surprising that Dr. Evans' testimony was so general. Dr. Evans was unable to interpret or opine on McLain's actual conduct in prison because, as was obvious by the end of cross-examination, Dr. Evans did not know McLain's actual background and history -- he knew little more than what McLain had told him. Dr. Evans had never reviewed any of McLain's prison records, never reviewed any of his medical or mental health records, and never spoke with any prior diagnosticians. He had spoken only with McLain and McLain's attorneys.

Kossoris' grilled Dr. Evans on the foundation for his diagnosis. On cross-examination, Dr. Evans acknowledged that McLain was an untrustworthy source for information, was the type of person who would attempt to lie and attempt to manipulate a psychologist, and that Dr. Evans knew that McLain in fact had admitted trying to slant other mental health examinations. Kossoris elicited that, notwithstanding these concerns, Dr. Evans made no attempt to verify the accuracy of McLain's statements and that his diagnosis was based entirely on McLain's statements to him during 7 1/2 hours of interviews. (37 R.T. 9279-80, 9294, 9300-02.)

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5. As noted above, just after this point Pell called for a bench conference, apologized for allowing Dr. Evans to stray into adaptability testimony not strictly tied to McLain's past, and, after promising not to mention the testimony during closing argument, began questioning Dr. Evans regarding a diferent personality disorder diagnosis. (37 R.T. 9255-56.) The trial court's order, thus, also had an unanticipated adverse impact on McLain's ability to fully develop the scope of this expert's opinion.

Dr. Evans explained that his purpose in interviewing McLain was to try to learn what McLain wanted him to believe, not necessarily what was in fact true. Nonetheless, in the absence of any background information, his testimony regarding the likelihood of McLain's future conduct in prison could easily be perceived as little more than abstract speculation.

As noted after a similar routing of psychological testimony: "[O]ne of the main prosecutor's main strategies in cross-examining [the psychologist] was to establish that [defendant] was probably lying ... Even reading a cold record, it is clear that this strategy was effective." Hendricks v. Vasquez, 974 F.2d 1099, 1110 (9th Cir. 1992). While it is possible that the jury may still have accepted the personality disorder diagnoses -- which is all that he was originally retained to do -- Dr. Evans was clearly an unpromising source for basing a prediction of McLain's future behavior. His testimony did not cure the trial court's erroneous exclusion of Dr. Clair.

For similar reasons, Pell's closing argument in which he opined that McLain would be a safe prison risk is insufficient. (R.T.Aug. 112.) Not only is Pell not a psychologist (and unlike Dr. Clair, not a psychologist with significant experience with inmates), but the jury was likely to treat Pell's statement for what it was, the statement of a partisan advocate. Boyde v. California, 494 U.S. 370, 384 (1990).

In order to supply the factual basis for Dr. Evans' otherwise-unsupported opinion testimony, Pell ended up relying on the testimony of Lonnie Chatman, the jailhouse lawyer who testified that he had prepared the affidavit of innocence for McLain, and the prison records he received from Dr. Clair -- neither of which were known to Dr. Evans. Other than the trivial nature of most of Chatman's examples (lending money to fellow inmates, helping inmates move cells) what is most significant is his clear bias -- argued by the prosecutor to have plainly come across in his demeanor. (R.T.Aug. 15-17.) There could

have been little doubt in the jury's mind that Chatman had in fact lied about preparing the affidavit; even McLain remembered things differently. In any event, irrespective of Chatman's demeanor or the likelihood that he lied about the affidavit, this testimony focused only on specific past events; it did not address McLain's general adaptability to prison and the threat he might (or might not) pose to prison security. Moreover, one inmate's interpretation of another inmate's prison behavior is likely to be far less influential with a jury than the opinion of a staff psychologist who was not only professionally trained to render a diagnosis of an inmate's potential for future danger, not only had substantial experience doing so, but who was employed by the state prison system to perform that very task.

As the Court explained in analyzing the prejudice element in Skipper:

> The evidence petitioner was allowed to present on the issue of his conduct in jail was the sort of evidence that a jury naturally would tend to discount as self-serving. The testimony of more disinterested witnesses -- and, in particular, of jailers who would have had no particular reason to be favorably predisposed toward one of their charges -- would quite naturally be given much greater weight by the jury.

Skipper, 476 U.S. at 8.

Here, while Dr. Clair could not quite be classified as one of McLain's "jailers", his association with the California Department of Corrections would certainly have lent a strong measure of credibility to his assessment of McLain's adaptation to the prison environment. His general association with the prison system was also likely to carry a degree of objectivity as someone whom, if he had any allegiances, would be as likely to testify for the State. If for no other reason than this, Dr. Evans' testimony was clearly no adequate substitute for the proffer from Dr. Clair. Yet, in addition, Dr. Clair's

extensive work with prisoners obviously gave him a wealth of experience in rendering such diagnoses. As a staff psychologist for the prison system, Dr. Clair's opinion was likely to be far more persuasive in predicting a criminal's future violence than would the opinion of a local general practitioner like Dr. Evans.

Dr. Clair was not only better qualified to render the type of opinion sought to be elicited, but he was also better prepared for the task. As a prison staff psychologist who had not only interviewed McLain, but also had reviewed McLain's prison records, Dr. Clair was likely to be able to present a significantly stronger foundation, not only for interpreting McLain's past as Dr. Evans had difficulty doing, but also for assessing McLain's likely future dangerousness. Although Dr. Clair might ultimately have been permitted to testify as to McLain's past records, he was clearly prohibited from giving an opinion as to the risk that McLain posed to the administration of the prison and his fellow inmates if not only incarcerated, but incarcerated for life.

Finally, the insignificance of Dr. Evans' testimony is reinforced by its brevity. The statements were curt and barely noticeable. Not only did it amount to nothing more than two isolated statements buried in the context of other comments, but they were so innocuous that the trial court did not initially recognize the brief foray into this forbidden zone. Further, once the problem was highlighted, the prosecutor not only did not object, but did not consider the testimony substantial enough to warrant an admonition. More significantly, even if the testimony was originally noticed by the jury, it was surely eclipsed by the other evidence when Pell was prohibited from mentioning it during his closing argument.

In sum, Dr. Clair's testimony would not have been cumulative to Pell's argument or to the brief comments on the subject made by Dr. Evans. Neither adequately covered the issue that the trial court precluded from being addressed.

The testimony that McLain was able to present -- Dr. Evans' abstract speculation not based on any records, the thoroughly impeached jailhouse lawyer's comments about McLain's past behavior, and the bare prison records unaccompanied by any professional opinion interpreting the threat McLain would or would not pose to prison safety -- was clearly insubstantial in comparison to the substantial foundation for Dr. Clair's opinion combined with his status as both a more experienced and a more disinterested witness by virtue of his employment as a prison staff psychologist. In light of the significance that the prosecutor placed on the issue of McLain's future threat to the safety of any prison where he would be incarcerated, the exclusion of testimony regarding McLain's ability to adapt to a prison environment could not help but have had a "substantial ... influence in determining the jury's verdict." Brecht, 113 S. Ct. at 1722. The Court therefore grants the petition for writ of habeas corpus limited to the sentencing judgment based on McLain's fifteenth claim for relief.

XVI. Sixteenth Claim: Failure to Instruct -- Accomplice's Ineligibility for Death Penalty

A. The Eighth Amendment Requires that the Sentencing Entity Consider All Relevant Evidence That Would Provide the Basis for a Sentence Less than Death

It has long been settled in the realm of death penalty jurisprudence that "'the sentencer ... not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" Skipper, 476 U.S. at 4, quoting Eddings, 455 U.S. at 110, quoting Lockett, 438 U.S. at 604 (plurality) (emphasis original). As further explained by Skipper, "[e]qually clear is the

corollary rule that the sentencer may not ... be precluded from considering any relevant mitigating evidence.'" Skipper, 476 U.S. at 4. The Skipper Court added that these rules are "now well established," noting that "the State does not question them." Id.

Lockett explicitly dealt with the right to have the sentencer consider the defendant's limited role in the offense as mitigating evidence. Lockett, 438 U.S. at 597. California death penalty juries are specifically directed to consider the defendant's role in the offense. Cal.Pen.Code § 190.3(j). The Lockett-Eddings rule has been applied in various places to numerous types of proposed mitigating evidence.

The sentencer should be allowed to consider evidence of the more lenient sentence accorded a more culpable accomplice. If the jury concludes that the defendant's role in the offense is minor compared to other participants, even if it considered the crime and defendant potentially deserving of death, evidence that some or all of the more-culpable accomplices did not receive death sentences would certainly be considered by the jury as a strong "basis for a sentence less than death." Skipper, 476 U.S. at 4. Cf. Beam v. Paskett, 3 F.3d 1301, 1304 n.1 (9th Cir. 1993) (dual juries increase likelihood that each jury will maximize culpability of defendant being judged and increases likelihood of death sentence of less culpable defendants); Mak, 970 F.2d at 616, 623-24 (Ninth Circuit clearly impressed intracase proportionality where defendant denied opportunity to present evidence regarding allegedly more culpable unindicted accomplice); Lockett, 438 U.S. at 597-607 (same).

To date, however, the application of the Lockett-Eddings rule to this precise setting has not been addressed by either the Ninth Circuit or Supreme Court and various other courts appear to be split. Cf. Frey v. Fulcomer, 974 F.2d 348, 366 n.22 (3d Cir. 1992) (collecting cases), cert. denied, 113 S. Ct. 1368 (1993). Without addressing the issue of its constitutional

admissibility, however, the Supreme Court has expressly acknowledged the mitigating force behind evidence that accomplices -- especially more culpable accomplices -- received more lenient sentences than death. Parker, 498 U.S. at 314, 315, 316. Although not evidence of the defendant's "character or record," it is evidence relating to the offense and its punishment that would provide "a basis for a sentence less than death." Skipper, 476 U.S. at 4. See also 21 U.S.C. § 848(m)(8) (federal death penalty statute expressly lists non-death sentence for equally culpable codefendant as potential mitigating factor). Indeed, it is probably indicative of the Supreme Court's attitude that it has never sanctioned the exclusion of any type of mitigating evidence.

The only way to allow the jury to consider the evidence of proportionality among co-defendants is to consider the evidence of sentence as well. Since the defendant's and accomplice's respective roles in the offenses are questions for the jury to resolve, the jury is the body that must consider whether the non- death sentence of an accomplice is mitigating or irrelevant.

B. Under the Facts of this Case, McLain Cannot Show Prejudice Flowing from the Trial Court's Ruling

While the jury should have been allowed to consider the evidence of Willis' statutory ineligibility for the death penalty, the Court finds that the addition of that evidence would not likely have affected the penalty phase verdict in this case. An analysis of the prejudice component, however, requires the review of several preliminary factors.

First, it cannot be gainsaid that the jury found McLain to be on the top tier of culpability. The evidence indicated that McLain was either the leader or he was not involved at all. The evidence that McLain was not involved at all was highly suspect. In convicting him of

conspiracy and first degree murder and in finding true the special firearm use allegation, the jury rejected his contention that he did not participate in the murder. In sentencing him to death, the jury obviously rejected his invitation to consider the impact of any residual doubt. Further, while all the evidence showed that Willis was also personally involved in the Kelley murder, the evidence also arguably showed (although not very credibly) that Ketcherside was not involved. This scenario left McLain in the leader's position. There is little likelihood that this jury -- or any reasonable jury -- would have found Willis more culpable than McLain.

Even stronger than the comparison of Willis and McLain directly, there is virtually no possibility that the jury would have considered Willis more culpable than Ketcherside vis-a-vis McLain. The physical evidence, such as fingerprints and blood stains, indicated that Ketcherside and Willis were both involved in the Kelley murder. Despite Ketcherside's assertion that he was not present when Kelley was raped or killed, even the prosecutor expressed doubts of the veracity of this tale. The eyewitness evidence placed both Ketcherside and Willis with Bazargani's Volkswagen at the scene where Bazargani's body was dumped. Ketcherside's testimony about how the rings fit on Kelley's fingers strongly suggested that he was the one who removed them from her dead body. The jurors also knew, however, that Willis was incarcerated in juvenile hall. They must have realized that, unlike Ketcherside, Willis was not given immunity.

The third relevant factor is that the jury had an opportunity to observe Ketcherside as a witness and virtually all parties associated with the case concluded that he was untrustworthy. Also unlike Willis, Ketcherside had expressed extreme callousness regarding his role in the killings whereas the jury was presented with a Willis who had expressed deep ambivalence over the killing. The jury also heard that Ketcherside wanted to have a shoot-out with the police when they came to arrest the three. The

jury was also informed that Ketcherside had not learned from his errant ways. Notwithstanding the double immunity, Ketcherside was back in jail for having stolen a car in an incident unrelated to the Kelly or Bazargani crimes. Willis, on the other hand, had admitted participating in the killing to a fellow inmate in rather typical jailhouse-boastful terms. The jury was also told, however, that Willis had expressed extreme remorse and reluctance, saying that he really did not want to kill Kelley. Thus, given the other evidence presented in this case, the jury was not likely to have concluded that Willis was more culpable than Ketcherside. Any intracase proportionality problem, in the jury's eyes, would have been between Willis' and Ketcherside's relative punishments, not between Willis' and McLain's.

This is not a case where the defense was entirely precluded from making any argument regarding the relative culpability and the disproportionality of a death sentence for the defendant while the accomplices received non-death sentences. Here, McLain argued that it would be a miscarriage for McLain to be sentenced to death in light of the substantial evidence of Ketcherside's equal culpability along with his callousness toward the crimes and his lack of credibility. The defense hammered away at the fact that Ketcherside was not only not subject to death, but also that he was totally immune from any criminal sanctions whatsoever. The defense highlighted that Ketcherside had expressed extreme callousness over killing Bazargani, had attempted to start a shoot-out with the arresting officers, and was once again in trouble with the law for stealing another car. The jury deliberated over the penalty for almost three days. Proportional punishments for equally deserving individuals is so firmly rooted in our social conscience that it is highly likely that the jury actually considered the relevance of Ketcherside's immunity rather than ignore it as urged by the prosecutor. Notwithstanding the above, the jury came back with a death verdict.

The only additional evidence sought to be introduced was simply judicial notice that California Penal Code § 190.5 prohibited capital punishment for crimes committed by persons under 18 years old at the time of the offense. (37 R.T. 9386.) The addition of this one piece of evidence would not have measurably changed the picture presented to the jury. Both defense counsel presented the jury with strong arguments against the extremely disparate treatment that would have resulted from a death verdict against McLain with immunity for Ketcherside. There is no reasonable likelihood that this would have been altered by mentioning that Willis -- who was not as culpable as McLain, and arguably even less culpable than Ketcherside -- was not subject to the death penalty.

Since no prejudice could possibly have flowed, the error, if any, cannot be said to have had a "substantial and injurious effect or influence in determining the jury's verdict." Brecht, 113 S. Ct. at 1722.

XVII. Seventeenth Claim: Instruction Error -- Governor's Commutation Power

A. Constitutional Sufficiency of the Instruction on its Face

McLain's seventeenth claim for relief asserts that the penalty verdict was prejudicially tainted by a jury instruction that imparted erroneous and contradictory information regarding McLain's eligibility for parole if he were not sentenced to death. As explained by the Ninth Circuit in Hamilton, "in Ramos, the United States Supreme Court emphasized that the [unmodified] Briggs instruction itself was aimed at accuracy." Hamilton, 17 F.3d at 1160. "The necessary corollary of that holding that guides our analysis ... is that if an instruction is inaccurate or misleading it will not be upheld." Hamilton, 17 F.3d at 1160.

In this case, the jury was first told that a life sentence without possibility of parole was subject to the possibility that it could, at some future time, be commuted to a lesser sentence that included the possibility of parole. (7 C.T. 2086; R.T.Aug. 120.) Neither side disputes that this is accurate.

The jury was further informed that the power of commutation was solely vested in the Governor. (7 C.T. 2086; R.T.Aug. 120.) Neither side disputes that, as to McLain, this is inaccurate.

In California, the power to grant reprieves, pardons and commutations is generally vested exclusively in the Governor. Cal.Pen.Code § 4800, Cal.Const., art. V, § 8(a). California, however, has a different rule for persons, such as McLain, who have been twice convicted of a felony. For twice- convicted felons, the petition for a pardon or commutation must be sent directly to the Governor who is statutorily required to refer the matter to the Board of Prison Terms. Cal.Pen.Code § 4802. The Board of Prison Terms must conduct an investigation and make a recommendation which, in turn, must be reported back to the Governor. Cal.Pen.Code § 4813. Even with a favorable recommendation, however, the Governor cannot commute a sentence. There remains yet another hurdle.

As emphasized by the Ninth Circuit in Hamilton, "[e]ven if the Board of Prison Terms recommends commutation, the Governor cannot commute a sentence of life without possibility of parole unless four justices of the California Supreme Court recommend commutation." Id., 17 F.3d at 1162, citing Cal.Pen.Code § 4852, Cal.Const. art. V, § 8. See also Cal.Pen.Code § 4852.16. If a majority of the justices of the state supreme court do not recommend commutation, then the application is automatically denied. Cal.Pen.Code § 4852. Moreover, "even if both the Board of Prison Terms and four justices of the Supreme Court recommend commutation, the Governor has the authority to reject the recommendations." Hamilton, 17 F.3d at 1162.

As pointed out by Hamilton and McLain, the procedures for obtaining a commutation by a twice-convicted felon are far more rigorous than those reflected in the original Briggs Instruction. To accommodate these variances, the trial judge in Hamilton expressly instructed the Hamilton jury regarding the procedural obstacles in obtaining the commutation of an otherwise-unparolable life sentence. McLain's jury was not informed about the labyrinthine process described above. The suggestion that the Governor was solely empowered to commute a non-parolable life sentence to a sentence where parole was available was incorrect.

Immediately after informing McLain's jury that a sentence of life without possibility of parole could be commuted, the trial court then directed the jury not to consider the possibility of parole in arriving at its penalty verdict: "[y]ou may not speculate as to if or when a commutation or modification would or would not be granted." (7 C.T. 2086; R.T.Aug. 121.) The Hamilton jury was given similar instructions. While there was no inaccuracy in this portion of the instruction, the Ninth Circuit noted that this section was "wholly inconsistent with the prosecution's request that the jury be expressly instructed to consider the Governor's power of commutation." Hamilton, 17 F.3d at 1161.

The last main portion of the instruction directed the jury to "assume that the governor will perform his duty in a correct and responsible manner" and would not grant a commutation unless it would be safe to release McLain on parole. The Hamilton jury was instructed in similar terms and the Ninth Circuit criticized this portion of the instruction as having "not only created a negative implication that the [Governor] would not properly perform" his job, but it also "invited the jury to assume that the question of [defendant's] release would automatically come before" the Governor. Because the process could be terminated before even reaching the

Governor, "[t]his too was inaccurate." Hamilton, 17 F.3d at 1161.

The driving force behind Hamilton, however, was an additional modification made in Hamilton's case that was not made in McLain's. In Hamilton, the jury was "effectively told ... that if it sentenced Hamilton to life without possibility of parole, he would be eligible for parole after serving only 16 years and 8 months in prison." Hamilton, 17 F.3d at 1161 (emphasis added). As explained by the Ninth Circuit:

> This was incorrect. Hamilton would be eligible for parole only if the sentence were commuted to life imprisonment with the possibility of parole. This fact was not explained in the ... instruction to the jury. The ... instruction was therefore misleading and inaccurate.

Hamilton, 17 F.3d at 1161.

In essence, McLain received the identical instruction given in Hamilton, with two variations. First, Hamilton's jury was correctly instructed on the contingencies that could preclude the Governor from issuing a commutation -- information about the involvement of the state supreme court and the Board of Prison Terms. Second, Hamilton's jury was told that a sentence of life without possibility of parole not only meant life with possibility of commutation, but that even under a sentence of life "without possibility of parole," Hamilton would in fact be eligible for parole in less than 17 years.

The Ninth Circuit in Hamilton found the first variation troublesome. As explained by the court, the jury was tasked with exercising "guided discretion" in determining whether death was the appropriate sentence for Hamilton. In light of the modified instruction, however, the jury "was diverted from this task by having its attention focused on commutation procedures rather than the significant mitigating evidence defense counsel introduced at the penalty phase." Hamilton, 17 F.3d at 1162-63.

Unlike Hamilton, McLain's jury was not given detailed instructions regarding the commutation process. As the Ninth Circuit noted, however, this additional information was not necessarily beneficial. When this additional information was provided to the jury, the circuit noted that it tended to divert the jury's attention away from the tasks properly assigned to it. Hamilton, 17 F.3d at 1162-63. The resulting instruction given to McLain's jury was inaccurate in failing to inform the jury that commutation was not committed to the governor's sole discretion, but rather, that commutation would also require a favorable recommendation by the Board of Prison Terms and the concurrence of four members of the state supreme court. The lack of detailed information regarding the commutation process, however, was not likely to be material to the jury. The jurors were far more likely to be concerned about the fact that commutation was available than with the procedural obstacles to be overcome before commutation could actually be granted.

The second variation between McLain's instruction and Hamilton's, however, was likely the key element that prompted the Ninth Circuit to grant relief. California sentencing juries are given only two possible sentencing options: life without possibility of parole or death. Cal.Pen.Code §§ 190.2, 190.3. In Ramos, the Supreme Court held that it was constitutionally permissible to inform the jury that a sentence of life without possibility of parole could be commuted to a lesser sentence in which parole was available. Hamilton's jury, however, was not simply informed that a sentence of life without possibility of parole could be commuted to a sentence where parole was available. Rather, the trial court confusingly suggested to the jury that the life without possibility of parole sentence was itself a misnomer under which parole was in fact a possibility regardless of the commutation process. Moreover, the jury was not only informed that parole was a possibility, but also told that Hamilton would in fact be eligible for parole in less than

17 years -- even if the jury sentenced him to life without possibility of parole. Unlike Hamilton, McLain's jury was not informed that McLain would be eligible for parole notwithstanding the name of the alternative, non-death sentence.

If Hamilton's jury misinterpreted the instruction in the way that the Ninth Circuit feared it could, the significance of the error cannot be ignored. As the Supreme Court recently recognized in Simmons v. South Carolina, 114 S. Ct. 2187 (1994):

> Holding all other factors constant, it is entirely reasonable for a sentencing jury to view a defendant who is eligible for parole as a greater threat to society than a defendant who is not. Indeed, there may be no greater assurance of a defendant's future nondangerousness than the fact that he never will be released on parole.

Simmons, 114 S. Ct. at 2194.

The Court also recognized that this concern was compounded by the fact that

> most juries lack accurate information about the precise meaning of "life imprisonment" [since ..., for] much of our country's history, parole was a mainstay of state and federal sentencing regimes, and every term (whether a term of life or a term of years) in practice was understood to be shorter than the stated term.

Simmons, 114 S. Ct. at 2197.

Where the possibility of parole is raised in the jury's mind, "it is impossible to ignore the reality, known to the 'reasonable juror,' that, historically, life-term defendants have been eligible for parole." Simmons, 114 S. Ct. at 2197 (internal quotation omitted).

In Hamilton, the jury was not only told that a non-parolable life sentence could be commuted to a parolable life sentence but, according to the Ninth Circuit, it was reasonably likely that the jury understood that the "non- parolable" life sentence was itself subject to the

possibility of parole, a possibility that would materialize in less than 17 years irrespective of the commutation process. Undeniably, this misinformation would be devastating to the defense.

McLain's jury, however, was not similarly misinformed. McLain's jury was first informed that the Governor could commute a non-parolable life sentence to a parolable life sentence by the Governor. It was next instructed to disregard the possibility of commutation. Although the modifications made to the original Briggs Instruction contained some inaccuracies, unlike in Hamilton, McLain's jury was not informed that it was actually choosing between a sentence of death and a sentence of life with possibility of parole that was misleadingly called, for some unexplained eccentricity, life "without" possibility of parole.

While the bulk of the modified Briggs Instructions given in both McLain's and Hamilton's case were similar in many respects, in the most important aspect, the instruction delivered to McLain's jury was different -- more accurate and more favorable. McLain's jury was not likely to have been misled into believing that a non-parolable life sentence was in fact itself subject to the contingencies of parole even without commutation.

Clearly, the Ninth Circuit did not reserve its criticism of the other errors in the modified instruction. In addition to condemning the portion of the instruction suggesting that Hamilton might be released or parole-eligible under the non-death sentence, the Ninth Circuit also criticized the suggestion that commutation and parole would automatically be considered by the Governor and the other officials and also "creat[ing] a negative implication that the officials would not properly perform their jobs." Hamilton, 17 F.3d at 1161.

Yet, even though the Ninth Circuit criticized other portions of the modified Briggs Instruction, the writ was not compelled by those errors. The Ninth Circuit's decision in Hamilton makes plain that the reversal was not

simply prompted by the length, emphasis, or detail of the instruction. Rather, the reversal was mandated because the modifications "allowed the jury to impose a death sentence based upon improper assumptions concerning parole eligibility." Hamilton, 17 F.3d at 1163. While criticized portions of the Hamilton instruction were also included in McLain's case, none were as momentous as telling the jury that "without possibility of parole" is a blatant misnomer.

B. Denial of Equal Protection of the Laws

Even after the United States Supreme Court ruled in California v. Ramos, 463 U.S. 992, that informing the jury about the possibility of commutation is not inherently unfair, on remand the California Supreme Court again reversed the penalty verdict due to the Briggs Instruction, holding that, under the state constitution's due process clause, "it is seriously and prejudicially misleading and ... invites the jury to be influenced by speculative and improper considerations." People v. Ramos, 37 Cal.3d 136, 153, 207 Cal. Rptr. 800 (1984) (Ramos II), cert. denied, 471 U.S. 1119 (1985). The state court viewed the error as so fundamental as to require, without more, reversal of the penalty verdict.

After Ramos II, the California Supreme Court routinely reversed all penalty verdicts in which a Briggs Instruction was given. Until Hamilton. In the spring of 1988, the California Supreme Court decided People v. Hamilton, 45 Cal.3d 351, 247 Cal. Rptr. 31 (1988) (Hamilton II), cert. denied, 488 U.S. 1047 (1989), which held that a modified Briggs Instruction was not prejudicial because the it carried an addendum directing the jury to ignore the possibility of commutation in arriving at its sentencing verdict. Hamilton II, 45 Cal.3d at 375.

When deciding McLain's direct appeal only a few months later, the California Supreme Court reaffirmed that the instruction violated state constitutional due

process guarantees. Nonetheless, the court ruled that, for the same reasons explained in Hamilton II, the instruction was not prejudicial. The court reasoned:

> [T]he court instructed the jurors not to consider "such power by a governor to commute or modify a sentence ... in determining whether the defendant should be sentenced to death or life imprisonment without possibility of parole." The court thus directed the jurors to make no use of the Briggs Instruction in choosing the penalty. Jurors are, of course, presumed to follow the instructions given by the court. We find no reason to believe that the jurors here failed to discharge their duty. Hence, we conclude the giving of the Briggs Instruction did not amount to reversible error in this case.

McLain, 46 Cal.3d at 119-20.[6]

McLain complains that the California Supreme Court deprived him of equal protection of the laws by arbitrarily and discriminatorily denying him the benefit of the holding in Ramos II -- a holding, according to McLain, that the state court had applied to all other capital defendants. The Ninth Circuit has held that "once a state has established a rule it must be applied evenhandedly." Myers, 897 F.2d at 421. The holding plainly rested on equal protection grounds:

> The equal protection clause prohibits a state from affording one person (other than the litigant whose case is used for the promulgation of a new rule) the ... benefit of a ruling on a state constitution's right ... while denying it to another.

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6. The Ninth Circuit found this rationale inappropriate where the jury had been materially misinformed as to the severity of the sentence less than death. Id., 17 F.3d at 1163. The court found this type of error to be among the small class of cases "'in which the risk that the jury will not, or cannot, follow the instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.'" Id., 17 F.3d at 1163, quoting Bruton v. United States, 391 U.S. 123, 135 (1968). Accord Simmons, 114 S. Ct. at 2198.

Myers, 897 F.2d at 421 (footnote omitted).

The Attorney General incorrectly argues that McLain cannot make out an equal protection claim because he is unable to define a legally cognizable class of which he is a member. In light of Myers, McLain's argument that he was denied the benefit of Ramos II clearly defines the class of people as capital defendants who had a Briggs Instruction given at their sentencing trial.

Nonetheless, this does not end the matter. Having defined the class, McLain must still demonstrate that the state has not applied its rule evenhandedly throughout the class.

Myers recognized that a state-created right need not require reversal in all cases -- only those in which it is applicable. Since the equal protection clause protects against arbitrary treatment, the question is whether the state court arbitrarily withheld enforcement of the state-created right. As Myers explained: "A state should not be permitted to treat defendants differently ... unless it has 'some rational basis, announced with reasonable precision' for doing so." Myers, 897 F.2d at 421, quoting Johnson v. Arizona, 462 F.2d 1352, 1354 (9th Cir. 1972).

Here, in denying McLain relief on his claim that the Briggs Instruction was prejudicial, the state court identified a distinction between McLain's case and the other cases in which Briggs Instructions were found prejudicial: McLain's jury was told to disregard the possibility of commutation. McLain, 46 Cal.3d at 119-20.

This Court is not empowered to decide whether the state court's ruling was correct under state law. McGuire, 502 U.S. at 67. That is a question exclusively relegated to the state courts. The state courts are the final expositors on the interpretation of state law and the state's interpretation is binding on the federal habeas court unless it is "untenable" or "appears to be an obvious subterfuge to evade consideration of a federal issue." McSherry v. Block, 880 F.2d 1049, 1053 n.3 (9th Cir. 1989), cert. denied, 499 U.S. 943 (1991). See also Knapp

v. Cardwell, 667 F.2d 1253, 1260 (9th Cir. 1982), Aponte v. Gomez, 993 F.2d 705, 707 (9th Cir. 1993). This is not such a case. The sole question here is whether the justification proffered is arbitrary. It is not. The state court identified a rational basis for distinguishing McLain's case. It is not insignificant that the California Supreme Court has relied on this distinction in a consistent manner. E.g. Hamilton II, 45 Cal.3d at 375. The California Supreme Court did not deny McLain equal protection of its laws.

McLain's seventeenth claim for relief is denied.

XVIII. Eighteenth Claim: Instruction Error -- Automatic Imposition of Death Penalty

Under California law, a death sentence is never mandatory -- not even when the aggravating circumstances outweigh the mitigating circumstances. People v. Brown, 40 Cal.3d 512, 538-43, 230 Cal. Rptr. 834 (1985), rev'd on other grounds, 479 U.S. 538 (1987). Jurors are entitled to vote for a life sentence if they believe that the death penalty is not "appropriate" under the circumstances. Brown, 40 Cal.3d at 542, People v. Edelbacher, 47 Cal.3d 983, 1035, 254 Cal. Rptr. 586 (1989). "The jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death." People v. Duncan, 53 Cal.3d 955, 979, 281 Cal. Rptr. 273 (1991), cert. denied, 112 S. Ct. 1269 (1992).

California Penal Code section 190.3 provides in relevant part:

> the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances.

Cal.Pen.Code § 190.3 (emphasis added).

In Brown, 40 Cal.3d 512, the California Supreme Court held that the statute did not require an automatic death sentence whenever the aggravating circumstances outweighed the mitigating ones. Rather, the state court interpreted this statute "to require jurors to make an individualized moral assessment on the basis of the character of the defendant and the circumstances of the crime, and thereby decide which penalty is appropriate in the particular case." McLain, 46 Cal.3d at 115, citing Brown, 40 Cal.3d at 540-41.

Prior to the state court's decision in Brown, many death penalty juries -- including McLain's -- were given an instruction that tracked the verbatim language of the statute. Fmr. CALJIC No. 8.84.2. The problems caused by this instruction were that

> [T]he provision's mandatory sentencing language might mislead [the jury].... [A] juror might reasonably understand that language to define the penalty determination as "simply a finding of facts" or "a mere mechanical counting of factors on each side of the imaginary 'scale'". We also believed that a juror might reasonably understand the language to require him to vote for death if he finds that the evidence in aggravation outweighs the evidence in mitigation -- even if he determines that death is not the appropriate penalty under all the circumstances.

McLain, 46 Cal.3d at 115, citing and quoting Brown, 40 Cal.3d at 540-44.

During his closing argument Kossoris initially characterized the process of weighing aggravating and mitigating factors as mechanical and mandatory. (R.T.Aug. 6:15-22.) The state supreme court found that this initial summarization improperly stated the balancing process. McLain, 46 Cal.3d at 116. Other than the one instance at the outset of his opening summation, Kossoris never again suggested that a death sentence was mandatory under any set of circumstances.

In affirming McLain's conviction notwithstanding the erroneous instruction, the California Supreme Court cited much of the prosecutor's closing argument and affirmed that his argument correctly represented California law. McLain, 46 Cal.3d at 116.

A. The Instruction is Not Facially Unconstitutional

McLain argues that he has a federal constitutional right to receive a non- death sentence whenever the jury believes that a death sentence is "not appropriate" even though the jury also finds that the aggravating evidence outweighs the mitigating evidence.

A facial challenge to this very same instruction was rejected in the context of an identical challenge in Boyde v. California, 494 U.S. 370 (1990):

> Petitioner suggests that the jury must have freedom to decline to impose the death penalty even if the jury decides that the aggravating circumstances "outweigh" the mitigating circumstances. But there is no such constitutional requirement of unfettered jury sentencing discretion in the jury ... Petitioner's claim that the "shall impose" language of CALJIC 8.84.2 unconstitutionallyprevents"individualizedassessment" by the jury is thus without merit.

Boyde, 494 U.S. at 377.

McLain's reliance on Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (en banc), is misplaced in light of Boyde.

B. In the Context of the Entire Proceedings, It is not Reasonably Likely that the Jurors Misunderstood the Scope of their Sentencing Discretion

McLain alternatively claims that, even if the federal constitution did not guaranty his right to a jury with discretion to decline to impose a non-death sentence,

California has extended him that right. McLain thus claims that the instruction, argument, and verdict form in this case unfairly deprived him of his right to have the jury consider whether a death sentence is "appropriate" notwithstanding its finding that the aggravating factors outweigh the mitigating ones.

Even though the right to have the jury decline to impose a death penalty because it would not be "appropriate" is purely a state created right, it is a significant part of California's death penalty regime. While California has determined that a non-parolable life sentence is the maximum sentence permissible when the mitigating circumstances outweigh the aggravating, it has also decided that capital defendants are entitled to have the jury consider whether a death sentence remains "appropriate" even when the aggravating circumstances outweigh the mitigating.

The Ninth Circuit and Supreme Court have recognized that even though the states may not be impelled to adopt any particular mode of procedure, "the failure of a state to abide by its own statutory commands may implicate a liberty interest protected by the Fourteenth Amendment against arbitrary deprivation by a state." Fetterly, 997 F.2d at 1300. As explained by another Ninth Circuit panel, "[Hicks v. Oklahoma, 447 U.S. 343 (1980)] recognized that state laws which guarantee a criminal defendant procedural rights at sentencing, even if not themselves constitutionally required, may give rise to liberty interests protected against arbitrary deprivation by the Fourteenth Amendment's Due Process Clause." Campbell v. Blodgett, 997 F.2d 512, 522 (9th Cir. 1992), cert. denied, 114 S. Ct. 1337 (1994). See also Ballard v. Estelle, 937 F.2d 453, 456 (9th Cir. 1991), Hernandez v. Ylst, 930 F.2d 714, 719 (9th Cir. 1991), Wasko v. Vasquez, 820 F.2d 1090, 1091 (9th Cir. 1987).

As explained in Fetterly, part of the emphasis on procedural regularity in death penalty cases is to ensure

reliability. Reliability is found where "'[aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.'" Fetterly, 997 F.2d at 1299, quoting Barclay, 463 U.S. at 954 (plurality) (brackets in original), quoting Proffitt v. Florida, 428 U.S. 242, 251 (1976). Thus, Fetterly explained, "[a]s pointed out by Justice Stevens, 'this Court's decisions have made clear that States may impose this ultimate sentence only if they follow procedures that are designed to assure reliability in sentencing determinations.'" Fetterly, 997 F.2d at 1299, quoting Barclay, 463 U.S. at 958-59 (Stevens, J., concurring).

Here, California has limited its death penalty to only those individuals for whom a jury has determined that the aggravating factors outweigh the mitigating factors and where death is also appropriate. Unlike some cases which are purely procedural in nature -- e.g. Campbell, 997 F.2d at 522 (degree of appellate review), Fetterly, 997 F.2d at 1300 (method of balancing aggravating and mitigating factors), Harris v. Vasquez, 949 F.2d 1497, 1522 (9th Cir. 1990) (right to competent experts), cert. denied, 503 U.S. 910 (1992), Hicks, 447 U.S. at 346 (jury sentencing discretion in non-capital case) -- the California rule at issue closely approximates a rule of substantive law. In light of California's recognition that capital juries have discretion to reject a death sentence even where there is no mitigating evidence, this substantive guaranty potentially offers an exemption from death to a substantial class of capital defendants. This is a substantial liberty interest. The claim cannot be dismissed as a "mere" attempt to seek relief based on errors of state law. Cf. McGuire, 502 U.S. at 67.

Quite significantly, the California Supreme Court thoroughly reviewed the penalty phase argument and concluded that it was consistent with the law set out in Brown, 40 Cal.3d 512. The state supreme court acknowledged that Kossoris' first comment regarding the

weighing process was inaccurate. McLain, 46 Cal.3d at 116. The state also reviewed the remainder of the penalty phase argument and concluded that whatever misimpression may have been left by the initial remarks were clarified and corrected by the remaining portion of the argument. The state courts are the final expositors on the interpretation of state law and the state's interpretation is binding on the federal habeas court unless it is "untenable" or "appears to be an obvious subterfuge to evade consideration of a federal issue." McSherry, 880 F.2d at 1053 n.3. See also Knapp, 667 F.2d at 1260, Aponte, 993 F.2d at 707. This is not such a case.

With the one exception noted at the beginning, Kossoris expressly distanced himself from the potential ambiguities highlighted by Brown and his argument was generally consistent with the weighing process described by Duncan. After his initial faux pas, Kossoris immediately noted that the jury was not to arrive at their verdict simply by "figuring out the number [of factors on each side]." (R.T.Aug. 7:2-6). Cf. Brown, 40 Cal.3d at 541 (jury might mistakenly believe penalty is determined "on the basis of some arithmetical formula"). Anticipating Brown, the prosecutor continuously focused on death as being the "appropriate penalty." (R.T.Aug. 38:12-39:24.) After three successive references to a death verdict as "appropriate" and twice as "deserved", Kossoris added that it was "required by the facts and the law." (R.T.Aug. 39:20-21.) This was immediately followed, however, by again characterizing a death sentence as "the only just and appropriate verdict in this case." (R.T.Aug. 39:23.)

Further, Kossoris' final closing argument left little room for ambiguity. He again referred to death as having been "deserved," reaffirmed the jury's duty to "evaluate each of the factors," and to bring back a "just verdict." (R.T.Aug. 84:23-85:17.) Never in the final closing did Kossoris suggest that death was legally required either because of the "shall impose" language or any other basis.

Rather, his final closing ended with another entreaty for "the only verdict that you can return in good conscience." (R.T.Aug. 85:13-14.)

The California Supreme Court's conclusion that the prosecution's argument did not materially mislead the jury as to the scope of its sentencing discretion was well-supported by the record. As explained by the state court, "the theme of the prosecutor's argument, repeated time and again, was that the evidence in aggravation was overwhelming and the evidence in mitigation was virtually nonexistent -- and hence that the evidence called for the penalty of death. Such a theme, of course, does not offend the principles of Brown." McLain, 46 Cal.3d at 116 (emphasis in original). The court's characterization of Kossoris' allusions to automatic or mandatory procedures -- in disregard of the appropriateness of a death verdict -- were correctly described as "short, isolated, and unemphatic" and "swallowed up in the theme that the evidence called for the penalty of death." McLain, 46 Cal.3d at 116, 117.

XIX. Nineteenth Claim: Instruction Error -- Factor (k)

At the penalty trial, the jury was given a modified version of a standard instruction regarding the evidence and factors to consider in arriving at the penalty verdict. The instruction stated in relevant part (with the additions underlined):

> In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, including, but not limited to, the defendant's character, background, history, mental and physical condition and matters relating to sentence.
>
> You should consider, take into account, and be guided by the following factors, if applicable:
>
> * * *

(k) any other circumstances which extenuate or mitigates the gravity of the crime, even though it's not a legal excuse for the crime. Fmr. CALJIC 8.84.1 (7 C.T. 2081-82, R.T.Aug. 117:17-24, 119:1-3.)

McLain complains that, since this version of "factor (k)" still focused on mitigating "the crime," the instruction impermissibly curtailed consideration of McLain's character and background as an independent basis for imposing a non-death verdict.

A. The Eighth Amendment Requires that the Sentencing Entity Consider Personal Background and Character Evidence as an Independent Mitigating Factor

It has long been settled in the realm of death penalty jurisprudence that "'the sentencer ... not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" Skipper, 476 U.S. at 4, quoting Eddings, 455 U.S. at 110, quoting Lockett, 438 U.S. at 604 (plurality) (emphasis original).

Not only must the sentencer be allowed to consider the defendant's character and background in considering whether death is the appropriate punishment, but it would be unconstitutional to "prevent[] the sentencer in ... capital cases from giving independent weight to aspects of the defendant's character and record and to the circumstances of the offense proffered in mitigation." Lockett, 438 U.S. at 605.

The sentencer must not only be allowed to consider the character or mitigating evidence insofar as it is relevant to establishing some other sentencing factor, but also the sentencer must be allowed to considered the character or other mitigating evidence as sentencing factor in its own right. Lockett, 438 U.S. at 608.

B. The Jury Instruction, Although Ambiguous, Is Not Defective on its Face

The trial judge's modification to the then-standard factor (k) instruction did not rectify the potential problem. Lockett affirmed that the Eighth Amendment commanded that sentencers be permitted to give independent weight to potential mitigating evidence no matter what other factors that State found were relevant to establishing whether the death penalty was appropriate.

The trial judge's modifications here -- made to the prefatory portion of the instruction -- only affirmed that the jurors should consider McLain's "character, background, history", etc., in assessing factors (a) through (k). Other than what was already contained in the standard instruction, the trial judge's modification did not specifically authorize the jurors to use McLain's "character, background, history," etc., as an independent mitigating factor. As in Lockett itself, the modification only broadened the scope of relevant evidence that could be considered when weighing the other statutory sentencing factors:

> [U]nder the [state] court's construction of the statute, only the ... factors specified in the statute can be considered in mitigation of the defendant's sentence.... The absence of direct proof that the defendant intended to cause the death of the victim is relevant for mitigating purposes only if it is established that it sheds some light on one of the ... statutory mitigating factors. Similarly, consideration of a defendant's comparatively minor role in the offense, or age, would generally not be permitted, as such, to affect the sentencing decision.

Lockett, 438 U.S. at 608.

Lockett held that such a sentencing regime is unconstitutional. Id., 438 U.S. at 604-05. Thus, unless one of the sentencing factors themselves encompassed these factors, the instruction ran afoul of Lockett's

commandment that this type of evidence be entitled to be given "independent mitigating weight." Lockett, 438 U.S. at 605.

The Supreme Court, however, has already assessed the propriety of an instruction similar to the one given here, albeit in its unmodified form. Boyde, 494 U.S. 370. The Supreme Court ruled that the instruction did not directly run afoul of the Lockett-Eddings principle because the instruction did not in fact preclude the sentencer from considering the mitigating evidence. Rather, the Supreme Court noted that the instruction was, at most, "ambiguous and therefore subject to an erroneous interpretation." Boyde, 494 U.S. at 380. Under these circumstances, the Supreme Court said that the test for judging the impact of such an instruction was

> whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.

Boyde, 494 U.S. at 380.

C. In the Circumstances of this Case, It is Not Reasonably Probable that the Jury Misinterpreted the Instruction as Precluding Independent Consideration of Mitigating Factors Relating to Character

As explained by Boyde, "'evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.'" Boyde, 494 U.S. at 382 (emphasis original), quoting Penry, 492 U.S. at 319. As also stated in Boyde,

> Petitioner had an opportunity through factor (k) to argue that his background and character "extenuated"

> or "excused" the seriousness of the crime, and we see no reason to believe that reasonable jurors would resist the view, "long held by society," that in an appropriate case such evidence would counsel imposition of a sentence less than death. The instructions did not, as petitioner seems to suggest, limit the jury's consideration to "any other circumstances of the crime which extenuates the gravity of the crime."

Boyde, 494 U.S. at 382 (emphasis in original).

Thus, when a jury is "directed to consider any other circumstance that might excuse the crime, ... [that] certainly includes a defendant's background and character." Boyde, 494 U.S. at 382 (emphasis original, footnote omitted).

Contrary to the Attorney General's contention, however, Boyde is not dispositive. Rather, the Supreme Court indicated that the validity of the instruction had to be assessed in the context of the entire proceedings in which the instruction was given. Because the Supreme Court found the context of the proceedings so important, Boyde cannot be controlling, but only very instructive. Nonetheless, in light of Boyde, viewed in the context of the current proceedings, the instruction was not "reasonably likely" to have been misinterpreted by the jury.

First, several of the other sentencing factors were not tied exclusively to the crime at issue. Thus, reasonable jurors were not likely to believe that factor (k) necessarily had to be limited only to the crime at issue. Boyde, 494 U.S. at 383.

More importantly, however, the evidence and argument of counsel provide substantial insight as to how the jury was likely to interpret the instruction. McLain introduced a substantial amount of mitigating evidence relating exclusively to his background, history, and character. In light of this heavy emphasis at the penalty trial, it is "unlikely that reasonable jurors would believe

the court's instructions transformed all of this 'favorable testimony into a virtual charade.'" Boyde, 494 U.S. at 383. Given the context of the evidence and instructions, "reasonable jurors surely would not have felt constrained by the factor (k) instruction to ignore [so much] of the evidence presented by petitioner during the sentencing phase." Id.

While the simple introduction of evidence does not guarantee that the jury will understand its obligation to consider it, "the introduction without objection of volumes of mitigating evidence is certainly relevant to deciding how a jury would understand the instruction." Id., 494 U.S. at 384. Although not constituting the totality of the penalty phase defense, the background and character evidence certainly represented a substantial portion of the defense. The substantial amount of evidence introduced tends to reinforce the probability that the jury did consider it. This is unlike the jurisdictions where sentencers have been specifically instructed to disregard such evidence. Boyde, 494 U.S. at 384, citing Lockett, 438 U.S. at 608 and Hitchcock, 481 U.S. at 398-99.

The final factor to consider are the arguments of counsel. The Supreme Court, however, has emphasized the limited role that counsel's argument normally has in terms of interpreting instructions:

> [A]rguments of counsel generally carry less weight with a jury than do instructions from the court.... This is not to say that prosecutorial misrepresentations may never have a decisive effect on the jury, but only that they are not to be judged as having the same force as an instruction from the court. And the argument of counsel, like the instructions of the court, must be judged in the context in which they are made.

Boyde, 494 U.S. at 384-85.

Contrary to McLain's argument, the prosecutor did not suggest to the jury that they could not or should not consider the evidence of McLain's character, background,

or family history. To the contrary, Kossoris repeatedly emphasized that the jury should consider McLain's background and character evidence and specifically argued that it was (1) insufficient to mitigate the crimes and (2) ultimately a factor in aggravation.

Indeed, it would have been counterproductive for Kossoris to suggest that character and background evidence could not be considered, because McLain's bad character was a prominent theme of the prosecutor's argument in support of a death verdict.

Early on in his initial closing argument, Kossoris explicitly directed the jury to consider the type of evidence at issue here. (R.T.Aug. 9:26-10:3.) Although initially attempting to dissuade the jury from being persuaded by this evidence, Kossoris specifically acknowledged the relevance of this mitigating background evidence. (R.T.Aug. 11:28-12:11.) Kossoris returned to this theme again and again. (R.T.Aug. 17:16-18, 27:27-28:2.)

While Kossoris attempted to minimize its significance, he never suggested that this evidence could not be considered. He extensively discussed the psychiatric testimony provided by Dr. Evans and the childhood background evidence. Kossoris repeatedly argued that these were insufficient to mitigate McLain's current and past offenses. Never, however, did he claim them to be irrelevant. Indeed, at one point Kossoris even acknowledged that McLain must have been suffering from mental disorders in order to have been capable of committing the crimes that he had. (R.T.Aug. 33:15-34:3.) When specifically addressing factor (k), Kossoris treaded lightly and summarily dismissed it rather than delve into detail, but then converted it into an aggravating factor in any event. (R.T.Aug. 37:15- 38:8.)

Finally, Kossoris stayed true to the same theme in his final closing -- not that the character evidence was irrelevant, but that it was, on balance, insignificant. (R.T.Aug. 83:4-13.) Although Kossoris' argument did not accurately represent the entire scope of the mitigating

facts presented by the defense -- the character mitigation was certainly not focused upon the single date where he did not assault the woman or the flat tire that he fixed for a stranger -- the jury had heard the actual testimony. It was in a position to evaluate Kossoris' assessment of the mitigating background and character evidence. What is critical here is that Kossoris never suggested that the character evidence simply had no place in the matrix of sentencing factors. Cf. Boyde, 494 U.S. at 385 (prosecutor's "principal tack was not to contend that background and character were irrelevant, but to urge the jury that despite petitioner's past difficulties, he must accept responsibility for his actions"). (Indeed, when Kossoris believed that the defense was arguing an impermissible theory of mitigation, he was hardly subtle. (R.T.Aug. 77:13- 22.).)

The final aspect of the case to be considered is defense counsel's argument. Boyde, 494 U.S. at 386. Here, too, defense counsel more than adequately explained to the jury what the instructions required. Both defense attorneys at the penalty phase repeatedly emphasized the importance of the mitigating background and character evidence. George Eskin, Pell's co-counsel at the penalty trial, tied it directly into factor (k). (R.T.Aug. 50:25-51:15.) Shortly after reminding them of the importance of factor (k), Eskin spent a substantial amount of time addressing what he considered to be some of the significant mitigating factors in McLain's background (R.T.Aug. 53-57) and then spent an almost equal portion of time specifically addressing the importance of Dr. Evans' testimony. (R.T.Aug. 58-60.) Nor did Pell shy away from explaining the applicability of the background and character evidence. (R.T.Aug. 89:14-19, 97-109.)

In light of the substantial amount of time devoted to arguing the importance of the character and background evidence and in light of the fact that Kossoris never came close to suggesting that it was irrelevant -- only insubstantial -- McLain's case is not materially

distinguishable from Boyde. There is no reasonable likelihood that the jury applied an erroneous interpretation to the instruction regarding factor (k). Relief on the basis of this claim is denied.

XX. Twentieth Claim: Instruction Error -- Juror Sympathy

Petitioner's twentieth claim for relief complains that the trial court instructed the jury not to be swayed by sympathy. This, he asserts, renders his death sentence unlawfully imposed in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

In the guilt phase, the jury was instructed that it "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." (R.T. 7968.) These instructions were incorporated into the penalty instructions.

The petitioner argues that this instruction prevented the jury from giving full and independent consideration to mitigating evidence. He also contends that he had a due process liberty interest in not being sentenced to die except by a jury that is free to respond to sympathy, pity, and compassion.

The United States Supreme Court has expressly held that the anti-sympathy instruction delivered here does not, on its face, violate the Eighth or Fourteenth Amendments by preventing a jury from giving full and independent consideration of mitigating evidence. California v. Brown, 107 S. Ct. 837, 840 (1989).

However, "the jury instructions -- taken as a whole -- must clearly inform the jury that they are to consider all relevant mitigating evidence about the defendant's background and character, or about the circumstances of the crime." Brown, 107 S. Ct. at 841 (O'Connor, J., concurring). The court must examine the jury instructions as a whole and the prosecutor's closing argument.

In the present case, the jury was instructed to consider all factors, both mitigating and aggravating. Furthermore, the prosecutor, while arguing that the mitigating factors were insubstantial, did acknowledge them and suggest the jury should consider them. He did not argue that the petitioner's background was irrelevant. Finally, defense counsel emphasized those factors and appealed to the juror's sympathy. (R.T.Aug. 97-114.)

Also without merit are Petitioner's arguments that the instruction violated his right to equal protection of the law and his due process liberty interest in having his sentence determined by a jury that is free to respond to sympathy, pity, and compassion. The instruction limits the jury to consideration of the evidence. There is no right to have a jury consider anything beyond the evidence.

The Court therefore denies McLain's twentieth claim for relief.

XXI. Twenty-First Claim: Denial of Mistrial Motion

In his twenty-first claim for relief, McLain contends that the death penalty verdict should be set aside based on the trial judge's erroneous denial of his motion for a mistrial. McLain complains about a comment during closing argument where the prosecutor implicitly accused the defense of suborning perjury. (R.T.Aug. 15-16.) McLain argues that the comment was so prejudicial that the subsequent admonishment given to the jury was inadequate.

The trial judge found that Kossoris' comments were clearly capable of being an accusation that the defense team was engaged in suborning perjury. (R.T.Aug. 42.) Given the literal text and context of the remarks, the trial judge's finding is not only presumed correct, 28 U.S.C. § 2254, but is more than adequately supported by the record. However, although the prosecutor's comments were admittedly improper, they addressed a secondary matter and were of limited significance in light of the

totality of the prosecutor's closing argument. The admonishment given by the court sufficiently constrained the jury from improperly using the comment.

In arguing the motion for mistrial, Kossoris represented that he had not intended to accuse the defense team of lying. (R.T.Aug. 42.) He explained that he intended only to attack Chatman's credibility and to suggest that the interview process contributed to producing an unreliable witness. (R.T.Aug. 42:6-15.) The trial judge's response -- "Well, I think that is legitimate. The problem is the manner in which it was put." (R.T.Aug. 42:16-17) -- was an implicit, on-the-record finding that Kossoris' intentions were as he stated them to be. Absent any substantial evidence to the contrary (and McLain does not present any), the trial judge's finding crediting Kossoris' explanation is entitled to be presumed correct. 28 U.S.C. § 2254(d), Hardnett v. Marshall, 25 F.3d 875, 879 (9th Cir. 1994). (Contrary to the Attorney General's assertion, the prosecutor's intentions are not entirely irrelevant. Brecht, 113 S. Ct. at 1722 n.9.)

In light of the trial judge's finding, this Court must accept that Kossoris' remark was not a purely gratuitous comment having no other purpose than to prejudice the defense. Given the literal text of Kossoris' comment itself, the Court cannot find that the comment was a direct accusation of suborning perjury. Rather, the Court must treat the remark as a genuinely ambiguous, albeit poorly phrased, attempt to argue the witness' credibility.

In determining whether a mistrial was constitutionally compelled, "the key consideration is whether the integrity of the proceeding was so infected that the entire trial was unfair." Hardnett, 25 F.3d at 879. Phrased another way, improper prosecutorial argument warrants habeas relief only when the remarks "render the trial fundamentally unfair so as to constitute a denial of due process." Siripongs v. Calderon, 35 F.3d 1308, 1319 (9th Cir. 1994), cert. denied, 115 S. Ct. 1175 (1995).

After denying the mistrial motion, the trial court read an admonishment to the jury that had been drafted by the attorneys. (R.T.Aug. 45:9-22.) McLain does not argue that the court's admonishment was itself deficient. In light of the trial judge's finding that Kossoris had not intended to accuse the defense of suborning perjury, the prompt admonishment to the jury likely cured whatever misimpression the jury might have been left with at the close of Kossoris' opening argument. The admonishment itself directly negated the likely impermissible inferences that the jury might have drawn from Kossoris' remarks.

Moreover, the prosecutor expressly retracted the erroneous interpretation of his remarks. His additional remarks clearly focused the jurors on Chatman's own credibility and the possibility for information leaks flowing from the investigator's interview process. His explanation reinforced to the jury that he was in full accord with the trial judge's admonishment. Reasonable jurors would clearly have understood that they were to be guided by the proper interpretation of the Kossoris' ambiguous remarks rather than the improper one.

Furthermore, Kossoris' closing argument overall addressed several potential theories of mitigation, lingering doubt as to the current crimes being only one of them. In the context of the prosecutor's argument regarding lingering doubt as to the Kelley crime, the comments regarding Chatman were only one among several reasons why the lingering doubt theory should be rejected.

The battle over the existence of the affidavit did not hinge upon Chatman's testimony, although it obviously would have been reinforced had the jury credited Chatman's testimony. McLain himself testified to the existence of the affidavit and mentioned that he had shown it to several people. Some of those people were called as witnesses in the penalty phase, although none referred to it. Pell even argued that the affidavit's existence could be inferred from the fact that Kossoris

refused to cross-examine any of the witnesses about the affidavit or to call as witnesses any of the other people who allegedly saw the document.

Not only was the Chatman evidence only one among many aspects, but it was not the cornerstone of either side's lingering doubt arguments. In his opening summation, other than the one currently-criticized remark about Chatman, the prosecutor said little about lingering doubt except to argue that all the convictions should simply be taken at face value. In his final summation, however, he argued that lingering doubt should be treated as a logically untenable mitigation theory and then suggested, in effect and without objection, that McLain had been convicted so many times that there was little doubt that any was the product of a mistaken identity. (R.T.Aug. 73-74.) Pell's lingering doubt argument highlighted that the physical evidence connected only Willis and Ketcherside, but not McLain. He added that McLain's conviction rested almost entirely on Ketcherside's credibility (reinforced only by the jailhouse informants). Pell also pointed out that, during the guilt phase, the jurors were unaware that Ketcherside not only received total immunity for the Ventura crime, but also received total immunity for a second murder as well. (R.T.Aug. 91-97.) These were likely to be far greater factors of concern than whether there was an affidavit and, if so, whether Chatman was the one who prepared it.

Although the prosecutor's comments were admittedly improper, they addressed a collateral matter and were of minimal significance in light of the totality of the prosecutor's closing argument. The admonishment given by the court sufficiently constrained the jury from improperly using the comment. The comments were not so prejudicial that the admonishment given to the jury was inadequate. There is little risk that McLain's death sentence was influenced, in any substantial way, by a misinterpretation of Kossoris' remarks. The brief ambiguous remarks did not render the entire penalty trial

fundamentally unfair. The twenty-first claim for relief is denied.

XXII. Twenty-Second Claim: Ineffective Assistance of Trial Counsel

Petitioner alleges his conviction and death sentence violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution because McLain was denied effective assistance of counsel. He asserts that Pell failed to perform competently during the penalty phase of McLain's trial by failing to discover and present significant mitigating evidence to the jury. This evidence includes evidence that (1) McLain suffered head injuries as a child through accidents, fights, and child abuse, (2) McLain suffers from blackouts, (3) McLain has serious mental problems, (4) McLain's father sexually abused him as a child, and (5) McLain grew up in poverty in "an impossible home situation." (2d Am.Ptn, 106:14.) McLain contends that if Pell had performed consistent with the norms of professional practice in 1980 and 1981, Pell would have discovered this evidence. Had Pell presented the evidence to the jury, McLain asserts that there is a reasonable possibility of a more favorable outcome.

A. McLain's Position

McLain argues that during the penalty phase of McLain's trial, Pell's performance was deficient and prejudicial. At the evidentiary hearing, McLain presented evidence concerning three issues: (1) standards of professional conduct concerning the penalty phase of capital trials in 1980 and 1981, (2) the existence of mitigating evidence undiscovered by McLain, and (3) Pell's failure to investigate alternative lines of defense.

1. Standards of Professional Conduct

McLain presented two experts on the issue of professional conduct, Bernard J. Rosen and Craig W. Haney. These experts testified that Pell's performance fell short of the generally prevailing professional standards in 1980 and 1981 in five general areas:

(1) Pell failed to begin investigation of the penalty phase defenses immediately upon his appointment and investigation of the guilt phase;

(2) Pell failed to discover all relevant mitigating evidence; (3) Pell failed to develop a social history for McLain based on all available records and evidence;

(4) Pell failed to provide all social history records to mental health experts to obtain an accurate and informed mental state assessment; and

(5) Pell failed to present mitigating social history and mental state evidence during the sentencing phase.

Rosen graduated from UCLA Law School in 1967 and was admitted to practice law in California in 1968. He has practiced criminal law almost exclusively since being admitted to the bar. After brief periods of employment as a deputy district attorney in Riverside County and in private practice, Rosen joined the Los Angeles Public Defender's Office in April 1970. From 1977 to 1983, the Public Defender's Office assigned Rosen to a special trials unit that handled complex trials and capital cases. By 1981, Rosen had tried two capital cases to a jury and three capital bench trials, and had handled eight to ten other capital cases that were resolved before trial. Rosen worked for that office until April 1985, when he joined the Alternate Defense Counsel. Since November 1986, Rosen has been a private practitioner.

Rosen testified that Pell was too inexperienced to perform within the norms governing capital trial practice in 1980 and 1981. Rosen stated that he found six deficiencies in Pell's performance:

(1) Pell should have advised the sentencing phase jury that a jury in Solano County had found McLain guilty of murder in a related killing. Because McLain had already been sentenced to life imprisonment without possibility of parole in Solano County, McLain's maximum exposure during the Ventura County murder trial was the additional possibility that he would be sentenced to death. Thus, Pell had no good tactical reason for failing to ask prospective jurors about the Solano conviction during voir dire.

(2) Pell should not have left the decision whether McLain should testify to McLain.[7] Although Pell could not have prevented McLain from testifying, Pell could have established a relationship that would have been more influential with McLain. McLain's testimony during the penalty phase was very prejudicial to McLain.

(3) Pell should not have left other tactical decisions up to McLain. At McLain's urging, Pell and Eskin relitigated McLain's 1971 conviction for rape during the penalty phase, engaging in lengthy cross examination of the rape victims rather than stipulating to the existence of the convictions. During the cross examination, one of the victims was reduced to tears.

(4) Pell should not have made statements in his opening argument during the sentencing phase that opened up damaging areas concerning McLain's conduct. During opening argument Pell stated that McLain loved children and that he loved and cared for his wife and child. Pell was aware that McLain had been convicted of child molestation and rape, that McLain had invited his daughter to watch McLain and his wife have intercourse,

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7. Rosen testified that he had found a document in Pell's trial files in which Pell indicated that McLain's story concerning the murders in question was "implausible, unreasonable, and uncorroborated." (Pet'r Exh. 291.) However, the Court credits Kossoris' testimony that he had created this document and had passed it to Pell, who also testified that the document may have come from Kossoris.

and that McLain's wife had divorced him in part because he had engaged in devil worship.

(5) Pell made serious mistakes and omissions in his investigation and presentation of evidence. Pell relied on success in the guilt phase and did little to prepare for the sentencing phase. Moreover, he left all investigatory tasks to a private investigator who had little training in developing penalty phase mitigation evidence.

(6) Pell should have declined the appointment to represent McLain because of Pell's inexperience. Pell passed the California bar in 1976, had little experience with criminal litigation, and no experience with capital cases prior to his appointment to represent McLain in the Ventura County trial.

Haney has a Ph.D. in psychology from Stanford University and a J.D. from the Stanford School of Law. He is a professor of psychology at the University of California, Santa Cruz, specializing in psychology and the law. He has done research on jury decisionmaking processes in death penalty cases, and for fifteen years has studied the background and social histories of those accused of or convicted of violent crimes, including capital murder. He has testified in many capital cases, usually for the defense.

Haney testified that since Lockett v. Ohio, 438 U.S. 586 (1978) (plurality), the defendant's background has been a focus of the penalty phase. By 1981, trial counsel in California were aware that it was important to develop the defendant's social history for presentation at trial. Haney began doing social histories in capital cases in the late 1970's. By 1981, a penalty phase investigation routinely included investigating the defendant's life and background. In capital cases, a social history is a biography compiling positive and negative information about significant events that have influenced the defendant's development. The social history humanizes defendants and helps the jury to understand them.

Effective presentation of a social history during the penalty phase requires an early investigation. Compiling a social history involves extensive interviews with the defendant and family members, as well as a thorough review of historical records. The defendant's counsel must obtain releases from the defendant authorizing access to confidential records. However, Pell failed to commission a social history or obtain releases.

2. Additional Potentially Mitigating Evidence

McLain presented testimony that Pell failed to discover and present two forms of mitigating evidence during the penalty phase: social historical evidence and evidence of brain damage.

Haney testified that his review of McLain's records and of interviews with McLain's family disclosed that McLain grew up in abject poverty within a seriously dysfunctional family. McLain's family arrived in California during the Dust Bowl migration. His father, a migrant worker, earned little as a crop watcher and as a junk scavenger. As a result, the family moved frequently, living in makeshift tents, toolsheds, or similar places.

McLain's father, who was 60 years old when McLain was born, was distant and abusive. He was often absent. His principal role was disciplinarian, often beating his children with branches from trees or rosebushes. Aside from this, he encouraged McLain's mother to engage in prostitution and made inappropriate sexual advances towards McLain's sisters and other young girls.

McLain's mother became physically disabled early in McLain's life and was bedridden throughout his childhood. She was an abused spouse, was emotionally detached, and perhaps suffered from clinical depression. She was chronically unhappy, often crying herself to sleep.

Aside from witnessing his father's behavior towards young girls, McLain's sister Frances molested him when he was five. In addition, an outsider forced him at gunpoint

to engage in oral copulation when McLain was fifteen or sixteen.

McLain's environment produced behavioral and emotional problems. McLain and his siblings often missed school. At around age six, McLain was involved in a car accident that left him with chronic headaches. He attempted suicide twice as an adolescent, dousing himself in lighter fluid and setting himself on fire, and taking an overdose of sleeping pills. Although he was sent to juvenile institutions, he received little or no treatment for his problems. Haney testified that because McLain never developed internalized restraints on his behavior, he behaves well in structured institutions such as prison, but poorly when left to his own devices.

McLain presented testimony on brain damage from Dr. James R. Merikangas. Merikangas received his M.D. from the Johns Hopkins University School of Medicine in 1969. After completing residencies in psychiatry and neurology at the Yale University School of Medicine in 1973, he taught at the University of Pittsburgh School of Medicine and the Yale University School of Medicine. He is presently in private practice in neurology and psychiatry. Merikangas has published substantial research concerning individuals who exhibit violent behavior and neurological damage. He has evaluated more than 100 people accused or convicted of murder, many of whom have had brain damage or psychiatric problems. He has often testified as a defense expert.

Merikangas conducted a full neurological assessment of McLain based on physical and neurological examinations and review of McLain's medical records. He testified that a broad range of medical, neurological, and psychiatric illnesses may cause violence. There is a strong but not necessarily direct relationship between a brain injury and behavior. However, other factors must also be taken into account in explaining violent behavior.

Merikangas' review of McLain's medical records indicates that (1) McLain was hit on the head with a

baseball bat in 1951, (2) McLain suffered from headaches and blackouts in 1957, (3) McLain suffered a head injury in a car accident in 1959, (4) McLain displayed borderline and abnormal electroencephalogram ("EEG") readings in 1962, (5) McLain was diagnosed as having temporal lobe seizures in 1962 and was prescribed dilantin, (6) McLain displayed a normal EEG in 1973 but reported headaches and blackouts, (7) McLain was diagnosed as having traumatic brain damage and seizures in 1974, (8) McLain was prescribed thorazine in 1977, and (9) McLain was diagnosed as having blackouts in 1987.

Merikangas' review of McLain's mental health records indicated that (1) McLain was diagnosed as psychotic in 1956, (2) McLain was committed to a mental hospital in 1960, (3) McLain was diagnosed as a schizoid personality with paranoid trends in 1962, (4) McLain complained of blackouts and twitching in 1972, and was diagnosed as having tangential thought processes, (5) the Department of Corrections assessed McLain as having a major convulsive disorder in 1973, and as being psychotic with traumatic brain damage and headaches, (6) from 1975 to 1980, McLain was diagnosed as schizophrenic with amnesia and as paranoid psychotic, (7) McLain was diagnosed as suffering from chronic nervous and mental disease and schizophrenia in 1980, (8) one doctor diagnosed McLain as incompetent to stand trial in 1980, (9) from 1980 to 1982, McLain was found to be incompetent and delusional, (10) McLain was diagnosed as suffering severe headaches, and (11) McLain was diagnosed as probably suffering some form of brain damage in 1991. Over this period, McLain has been prescribed a wide variety of drugs for anxiety, psychosis, and seizures.

Merikangas testified that McLain was born outside a hospital while his mother was ill, that he was abnormally heavy when born (10 to 11 pounds), and that he was born "with a veil," that is, the placental membranes were over his head, indicating possible lack of oxygen. McLain's early

mischievousness and short attention span were consistent with Attention Deficit Disorder ("ADD"). McLain sometimes engaged in strange episodes of activity that he could not remember. He had chronic ear infections and at age six was involved a car accident that left him unconscious for a period of time.

Merikangas testified that, on the basis of his examination, McLain suffered damage to the right hemisphere and frontal lobes of his brain. Merikangas' testified that his diagnosis is consistent with McLain's medical records. He stated that other medical professionals failed to reach similar conclusions because they lacked the expertise necessary to assess brain damage. Moreover, he believed that the fact that McLain's records do not uniformly indicate seizures could be explained by changes in McLain's diet, level of fatigue, and other factors. He also opined that the "normal" MRI scan in 1992 was unsurprising because an MRI cannot detect epilepsy, ADD, paranoia, or impulse disorders.

Merikangas testified that he believes that McLain has had brain damage since birth, and that McLain suffers from ADD, migraine headaches, and hypoglycemia. According to Merikangas, McLain's neurological damage reduces his ability to control his behavior. Merikangas explained that essentially the same examination could have been conducted in 1981.

3. Failure to Investigate Lines of Defense

McLain presented evidence that Pell failed to investigate alternative lines of defense before deciding his strategy during the penalty phase. Pell testified that he passed the California bar in 1976 and that prior to his appointment to represent McLain in the Ventura case he had no experience with capital trials.

During the penalty phase, Pell presented testimony from McLain and two other family members concerning McLain's background, and from one mental health expert,

Dr. Jerome Evans, concerning McLain's mental condition. Dr. Evans' testimony was, however, based solely on interviews with McLain. According to McLain, the social history testimony was incomplete and poorly prepared and Pell's decisions to present this testimony in this manner was not based on adequate investigation.

Pell decided to re-create the mitigation defense that was successfully used at the prior Solano County trial in which Pell had served as second counsel, even though circumstances had changed since the prior trial. Pell made this decision without hiring experts to review McLain's medical records or a social historian to create a social history. Pell left investigation decisions to Rick Wilson, his investigator. There is no evidence that Pell obtained releases to authorize examination of McLain's confidential records.

B. Respondent's Position

The government responds that Pell's performance during the penalty phase was competent and nonprejudicial. At the evidentiary hearing, the government presented evidence supporting its claims that Pell's performance during the penalty phase was within the norms of professional conduct in 1980 and 1981 and that there is no compelling evidence that McLain suffers from brain damage.

1. Standards of Professional Conduct

At the evidentiary hearing, the Pell described his preparation for the Ventura County trial. Although Pell had not handled a capital case prior to being appointed to the Ventura case, prior to the Ventura trial, Pell served as co- counsel during the penalty phase of McLain's Solano County murder trial. Pell contacted the California Attorneys for Criminal Justice, the American Civil Liberty Union, the National Lawyer Guild, and the Southern

Poverty Law Center for materials on handling capital cases. Pell obtained copies of the Kentucky Death Penalty Manual, the 1980 California Death Penalty Manual and the 1981 supplement thereto published by the California State Public Defender and California Attorneys for Criminal Justice. The California Death Penalty Manual also contained copies of the Death Penalty Update published by the California State Public Defender. These documents were authoritative evidence concerning the tactics and practice of attorneys handling capital cases in California in 1980 and 1981.

Pell's decisions were informed by these documents and his experience during the Solano County penalty phase trial. First, Pell decided to use the defense of residual doubt during the penalty phase. This defense was well-accepted and was commonly used by defense counsel handling capital cases in California in 1980 and 1981. According to Respondent, Pell reasonably chose not to argue a brain damage defense because it would have required an admission of guilt that was inconsistent with the residual doubt defense.

Second, allowing the defendant to testify during the penalty phase was an accepted method of humanizing the defendant in 1980 and 1981. Moreover, McLain had a right to testify against Pell's advice. People v. Robles, 2 Cal.3d 205, 215, 85 Cal. Rptr. 166, 172-73, 466 P.2d 710, 716-17 (1970).

Third, the State notes that Pell presented evidence of McLain's background, an accepted practice in 1980 and 1981. McLain testified, as did his sister and brother. Pell failed to present evidence of sexual abuse, according to Respondent, because this evidence could not reasonably have been discovered. Pell spent 100 hours interviewing McLain and McLain never mentioned sexual abuse. The State presented evidence that using social history experts was not a universal practice in California in the early 1980s. Although Pell's files contain no releases authorizing investigation of McLain's confidential records, Respondent

argues that any evidence in these records would have been cumulative. Had Pell presented a social history such as the one presented by Dr. Haney, the State contends that the jury would have heard negative information about McLain that Pell had successfully excluded. The Attorney General argues that the additional social history evidence would have enabled the jury to learn that McLain raped a 3 1/2 year old child when he was 12 and that McLain invited his own child to watch him have intercourse with her mother.

Fourth, making the defendant part of the defense team was an accepted practice in California in 1980 and 1981.

Fifth, the Attorney General argues that Pell acted in accordance with accepted practices in arguing that there was a disparity between the prosecutor's treatment of McLain and his treatment of Lloyd Ketcherside, an accomplice who received immunity.

Sixth, the State argues that Pell presented a simple and coherent defense during the penalty phase, in accordance with prevailing practices.

Seventh, in failing to investigate the possibility of organic brain damage, the State contends that Pell reasonably relied on the conclusions of Dr. Clair, who testified during the pretrial competence hearing. Clair examined McLain for brain damage and, although he suspected that there was an element of aberrant brain function in McLain's conduct that could not be determined with available tests, he found no conclusive evidence of brain damage.

Eighth, the State observes that Pell sought and obtained the appointment of co-counsel to help him present the penalty defense.

2. Absence of Brain Damage

To rebut McLain's contention that he suffers from brain damage, the State presented the testimony of Dr. Mark R. Nuwer and Jeffrey Schaeffer, M.D. as well as

evidence in McLain's medical records and elsewhere that he feigns mental disturbances and is a malingerer.

Dr. Nuwer has an M.D. and Ph.D. in neuro- and bio-behavioral sciences with a minor in psychology. He attended Stanford University Medical School. Thereafter, Nuwer did an internship in general medicine, a residency in neurology, and a fellowship in electroencephalography at the UCLA Medical Center. He is licensed to practice in California and is board certified in neurology with added qualification in clinical neurophysiology. He is currently on the faculty at the UCLA School of Medicine in the Department of Neurology and is the department head for clinical neurophysiology at the UCLA Medical Center. Although Nuwer has published widely, he has published little on neurological damage and violent behavior, and less than 1% of his patients are individuals who exhibit violent behavior. He often testifies on behalf of the State.

Although Nuwer did not examine McLain, he reviewed McLain's medical records and reports on McLain by Merikangas and a neuropsychologist, Dr. Nell Riley. Nuwer testified that he could find no objective evidence of brain damage. Nuwer disagreed with Merikangas, stating that none of the factors identified by Merikangas genuinely pointed to the existence of brain damage. Nuwer also testified that if McLain suffered from brain damage, this would produce bursts of violence and not the controlled crime with which McLain was charged.

Schaeffer's deposition was admitted in lieu of live testimony. Schaeffer is a neuropsychologist who, from 1979 to the present, has been president and executive director of Neuroscience Associates, Inc., in Los Angeles. Approximately one-third of Schaeffer's practice is forensic, with less than 10% of the forensic work being criminal. Schaeffer recalls three cases in which he examined a convicted or alleged murderer in jail or prison.

Although Schaeffer did not examine McLain, he reviewed McLain's medical records and the reports by

Riley. Schaeffer disagreed with Riley's conclusion that McLain suffers from serious brain dysfunction.

The State also presented evidence that McLain feigns blackouts and other mental disturbances. In 1957, a doctor who examined McLain stated that he believed that McLain lied about blackouts. McLain has inconsistently stated that his blackouts began in 1957 or 1959. No one has ever witnessed any of McLain's blackouts.

C. Discussion

The Sixth Amendment right of counsel guarantees criminal defendants effective assistance of counsel. Strickland v. Washington, 114 S. Ct. 2052, 2063 (1984). To demonstrate ineffective assistance of counsel, McLain must show that Pell's performance was deficient judged by the standard of reasonably competent lawyer, and that Pell's deficient performance prejudiced the defense. Id. at 2064.

1. Deficient Performance

In any case involving a claim of ineffective assistance of counsel, the test of deficient performance is whether counsel's assistance was reasonable considering all the circumstances. Id. at 2065. The Strickland Court cautioned that:

> No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.... Judicial scrutiny of counsel's performance must be highly deferential.... A fair assessment of attorney performance requires that every effort be

made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

Id.

Counsel's performance is presumed to be competent and the defendant must overcome this presumption. Id.

a. Failure to Investigate

It is undisputed that Pell failed to present a good deal of potentially mitigating evidence. He did not present evidence concerning McLain's abuse as a child, the failure of institutions and schools to remedy McLain's many problems, nor the possibility of brain damage. Thus, the threshold issue concerning performance is whether this failure stemmed from a reasonable strategic decision.

Pell's performance was deficient if he failed to conduct a reasonable investigation of alternative lines of defense. Id. at 2066. The Strickland Court explained:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any effectiveness case a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Id. Accord Mak, 970 F.2d at 618-19 (counsel's performance was inadequate because he failed to present mitigating evidence without conscious tactical evaluation of evidence's value) Hendricks, 974 F.2d at 1109-10.

In the present case, the evidence indicates that Pell, a diligent but inexperienced lawyer, failed to obtained releases that would have opened up McLain's personal records. Although Pell testified at the evidentiary hearing that he cannot remember whether he obtained releases, no releases are contained in Pell's trial files. Pell's failure to obtain the releases was not a reasoned tactical choice but an oversight on Pell's part. Pell delegated the obtaining of releases to his investigator and did not follow up on his investigator's activities.

Pell was aware of the value of evidence of McLain's background because he presented some of this type of evidence at trial. Moreover, Pell knew that evidence of brain damage would be mitigating. (See Resp.'s Exh. 640.2.) The use of social historians and medical experts to present this evidence was a commonly-accepted practice in 1980 and 1981. Even applying a heavy measure of deference to Pell's judgments, Pell's failure to investigate this mitigating evidence cannot be construed as reasonable because he did not consciously explore the possibility of presenting it. See Mak, 970 F.2d at 618-19. "[C] ounsel can hardly be said to have made a strategic choice when s/he [sic] has not yet obtained the facts on which such a decision could be made." Sanders v. Ratelle, 21 F.3d 1446, 1457 (9th Cir. 1994). Accord Evans v. Lewis, 885 F.2d 631, 637 (9th Cir. 1988), Deutscher v. Whitley, 884 F.2d 1152, 1160 (9th Cir. 1989), vac'd and remanded, 111 S. Ct. 1454, aff'd, 16 F.3d 981 (9th Cir. 1994). In order to make the reasoned choice that a repeat of the Solano trial would be sufficient, Pell had to determine that his alternatives were not better. In order to evaluate the alternatives, he had to conduct the penalty investigation.

Nor does it appear that this evidence would have opened the door to the evidence that Pell had successfully excluded. While character evidence is certainly subject to rebuttal, the introduction of some "good character" evidence does not open the door to an all-out assault on the defendant's character. People v. Rodriguez 42 Cal.3d

730, 792, 230 Cal. Rptr. 667 (1986). "As in other cases, the scope of rebuttal must be specific, and evidence presented or argued as rebuttal must relate directly to a particular incident or character trait defendant offers on his own behalf." People v. Ramirez, 50 Cal.3d 1158, 1193, 270 Cal. Rptr. 286 (1990). As recently reaffirmed by the state supreme court,

> [T]he prosecution is not permitted to go beyond the aspects of the defendant's background on which the defendant has introduced evidence. Thus, when a defendant confines his mitigating evidence to the adverse circumstances of his childhood, the prosecution may not 'introduce evidence of a course of misconduct throughout his teenage years that did not relate to the mitigating evidence' presented by defendant.

In re Jackson, 3 Cal.4th 578, 613-14, 5 Cal. Rptr. 2d 531 (1992), quoting, Ramirez, 50 Cal.3d at 1193.

Pell's failure to undertake an adequate penalty investigation has been left effectively unrebutted. Pell's performance during the penalty phase was deficient under Strickland.

2. Other Allegations of Deficient Performance

In addition to Pell's failure to investigate and present the full measure of available mitigating evidence, McLain contends that Pell's performance during the penalty phase was deficient in other respects.

First, McLain alleges Pell performed inadequately in permitting McLain to testify and to influence the course of his defense. However, McLain has a right to testify, People v. Robles, 2 Cal.3d 205, 215, 85 Cal. Rptr. 166, 172-73 (1970), and to influence his defense, Jeffries v. Blodgett, 5 F.3d 1180, 1198 (9th Cir. 1993), cert. denied, 114 S. Ct. 1294 (1994).

Second, McLain alleges Pell performed inadequately in permitting McLain's 1971 rape convictions to be

relitigated during the penalty phase. However, Pell's decision to allow close cross-examination of the government's witnesses is not unreasonable in view of Pell's tactical decision to present a residual doubt defense. See United States v. Humphries, 961 F.2d 1421, 1422-23 (9th Cir. 1992) (defense counsel's decision to permit "mini-trial" on aggravated assault during penalty phase not ineffective assistance).

Third, McLain alleges Pell performed inadequately by making statements about McLain's love of children and his marriage during opening argument, thereby opening up potentially damaging areas to the government. (R.T. 8708:12-18.) However, the penalty phase transcript reveals that Pell was well aware of the damaging evidence that was available for use against his client and generally kept his examination of witnesses narrowly focused so as to avoid opening up potentially damaging cross-examination, (36 R.T. 9078, 37 R.T. 9355-57), and that he successfully prevented the admission of the most damaging evidence in these areas, namely, his wife's allegations of McLain's devil worship and his invitation to his daughter to watch McLain and his wife have intercourse.

Fourth, McLain alleges Pell performed inadequately by failing to ask jurors on voir dire about the Solano County guilty verdict. Testifying at the evidentiary hearing, Pell identified several significant gaps in the prosecution's guilt case. Pell's decision to not voir dire about the Solano verdict was based on a reasonable strategic decision to avoid prejudicing the jurors during the guilt phase of the Ventura County murder trial. Had McLain successfully avoided a guilty verdict in Ventura County, he would have avoided the possibility of a death sentence from either murder and counsel's task on appeal would have been reduced to a challenge to the Solano County guilty verdict. Accordingly, Pell's decision to enhance the prospects of a not guilty verdict in Ventura County was not deficient performance.

Finally, McLain alleges Pell was too inexperienced to serve as counsel in a capital case. The Court may consider a lawyer's inexperience in addressing the competence prong of the Strickland test. Dillon v. Duckworth, 751 F.2d 895, 901 (7th Cir. 1984). However, the dispositive inquiry in resolving an ineffective assistance of counsel claim is not whether the lawyer was inexperienced, but whether in the totality of circumstances the lawyer's performance was deficient. See id. The Court may not infer deficient performance from the presence of inexperience alone. See United States v. Cronic, 104 S. Ct. 2039, 2046-51 (1984). The record clearly shows that at the time of McLain's Ventura trial, Pell had few years of experience as a lawyer and virtually no experience concerning the conduct of a defense in a capital case. His co-counsel, George Eskin, was appointed at the last moment to assist Pell during the penalty phase and he deferred to Pell's tactical judgments. (Eskin Depo., 44:12-46:14.) Accordingly, although Pell's inexperience is not an independent basis for ruling that his performance was inadequate, it gives additional support to the conclusion reached in Section XXII.C.1.a., supra.

In sum, except as to his investigation of penalty mitigation evidence, Pell provided reasonably competent representation during the penalty phase of McLain's Ventura trial. These other challenged acts do not give rise to a finding that Pell's performance fell below the level of reasonably competent counsel.

B. Prejudice

Pell's performance during the penalty phase was prejudicial if there is a reasonable probability that, absent the errors, the proceeding's result would have been different. Strickland, 104 S. Ct. at 2068. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. In making this determination, the Court must consider the totality of the

evidence. Id. 114 S. Ct. at 2069. The Strickland Court stated:

> In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary sufficiency, that the judge or jury acted according to law. An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like.... The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision.

Id., 114 S. Ct. at 2068.

Under California law, the penalty phase jury must find that aggravating circumstances outweigh mitigating circumstances before imposing the death penalty. Cal.Pen.Code § 190.3. The jury's penalty verdict must be unanimous, People v. Fauber, 2 Cal.4th 792, 848, 9 Cal. Rptr. 2d 24, 57 (1992), cert. denied, 113 S. Ct. 1651 (1993), but it need not be convinced beyond a reasonable doubt. People v. Cox, 51 Cal.3d 618, 692, 280 Cal. Rptr. 692 (1991).

In the present case, the testimony of Haney and Merikangas supports the conclusion that Pell failed to discover and present some potentially mitigating evidence concerning McLain's background and mental condition. However, this evidence is tangled with aggravating evidence that Pell successfully excluded. The prejudice component of the Strickland test requires the Court to determine whether there is a reasonable probability that this mixture of mitigating and aggravating evidence, if added to the evidence actually presented during penalty phase, would have changed the outcome. See Campbell v. Kincheloe, 829 F.2d 1453, 1464 (9th Cir. 1987).

During the penalty phase, the prosecution presented a large amount of aggravating evidence concerning McLain's previous felony convictions, including his conviction in 1960 for child molestation, his conviction in 1962 for burglary, attempted robbery, and kidnaping, and his convictions in 1971 for rape, oral copulation, and child molestation. As mitigating evidence, Pell presented testimony concerning McLain's character, background, and mental state.

Pell presented McLain's wife, McLain's sister, McLain's brother, coworkers, and acquaintances who testified that McLain could be helpful and kind. (R.T. 8739:17-8754:15 (wife), 8867:19-8869:1 (sister), 9214:22-9215:17 & 9217:2-19 (brother), 9188:15-9198:8 (coworker), 8911:2-24 (fellow inmate), 8995:14- 8997:15 (neighbor).) In addition, McLain's sister Frances and his brother James testified concerning McLain's background. They testified that (1) McLain had an impoverished childhood (R.T. 8855:20-22), (2) that McLain's family emigrated from Oklahoma and were forced to live under burlap bags due to poverty (R.T. 8854:1-28), (3) McLain's father was much older than McLain (R.T. 8855:5-13, 9213:7-12), (4) McLain's father was distant from McLain (R.T. 9318:2-17), (5) McLain's father beat McLain and his siblings severely (R.T. 8857:12-8858:17, 9218:6-18, 9318:2-27), (6) McLain's mother was ill and bedridden throughout McLain's childhood (R.T. 8866:3-14), (7) McLain's parents gave McLain little guidance as a child (R.T. 9212:24-9213:5), and (8) McLain had a troubled adolescence, spending some time in a juvenile hall (R.T. 8863:28-8864:12).

Although he presented no evidence of childhood sexual abuse, this testimony covered much of the ground a social historian would have covered. Even though the evidence lacked the thoroughness and structure of a social history prepared by an expert such as Haney, Pell could have, and did, argue the inferences that the jury should

have drawn from the mitigating character and background evidence.

Pell also presented some evidence concerning McLain's mental condition through Evans, although Evans based his testimony on interviews with McLain and not on the full range of McLain's medical records. Although Evans presented no formal evidence that McLain suffered from brain damage, Pell introduced some evidence that McLain suffered from recurrent headaches. (R.T. 8752:2-14.)

Had Pell more thoroughly investigated McLain's background and medical records, he might have presented more extensive evidence concerning McLain's background and mental condition. However, if Pell had presented a social history during the penalty phase, he might have provided the prosecutor with an opportunity to confront the jury with new aggravating evidence about McLain. The jury might have learned that McLain raped a 3 1/2 year old child when he was 12 and that McLain invited his own child to watch him have intercourse with her mother. A review of the penalty phase transcript indicates that Kossoris was an effective cross-examiner, skillful at eliciting testimony harmful to McLain. (R.T. 9275:10-9338:3 (cross-examination of Dr. Evans).) Furthermore, in view of the testimony of the government's experts, Nuwer and Schaeffer, the Court finds that Merikangas' testimony concerning brain damage is inconclusive.

In view of the significant aggravating evidence presented during the penalty phase and the fact that much of the social history and mental health evidence was already presented as mitigation, the Court concludes that the additional evidence now developed would not be reasonably likely to have resulted in a different penalty verdict.

For the reasons explained above, the Court denies McLain's twenty-second claim for relief.

XXIII. Twenty-Third Claim: Death Qualification of Jury

In his twenty-third claim for relief, McLain asserts that he was not convicted and sentenced by a jury from a fair cross-section of the community and, therefore, his conviction and death sentence were unlawfully imposed in violation of the Sixth, Eighth, and Fourteenth Amendments.

Prior to the penalty phase, the trial court "death qualified" the jury through voir dire. The State successfully challenged for cause one juror, Mavis Hawkinson, on the grounds that she would not vote for the death penalty. (R.T. 3783-90.) McLain complains that he was not convicted and sentenced by a jury drawn from a fair cross-section of the community, but by a jury consisting exclusively of jurors wholly unopposed to the death penalty.

McLain presents no supporting argument in his "Petitioner's Brief on Issues Not Covered by the Evidentiary Hearing." Nor did he brief this issue in his reply. The Court holds that McLain has abandoned this claim.

Moreover, even if the claim were addressed on its merits, it would be unavailing. The United States Supreme Court has specifically held:

> [T]he Constitution does not "prohibit the removal for cause, prior to the guilt phase of a bifurcated capital trial, of prospective jurors whose opposition to the death penalty is so strong it would prevent or substantially impair the performance of their duties as jurors at the sentencing phase of the trial."

Buchanan v. Kentucky, 107 S. Ct. 2906, 2913 (1987) (quoting Lockhart v. McCree, 106 S. Ct. 1758, 1760 (1986)).

Through voir dire, Ms. Hawkinson made it unavoidably clear that she was strongly opposed to the death penalty. As long as she could remember she had held the belief that she "could not take another person's

life." While Ms. Hawkinson stated that she could perform her duties in the guilt phase, she clearly stated she could not follow the court's instructions if that would lead to imposing the death penalty. In fact, Ms. Hawkinson stated she could not consider imposing the death penalty even if "Adolph Hitler [were] on trial for murdering millions of people and doing heinous and terrible actions upon ... millions of people."

It is clear that Ms. Hawkinson's opposition to the death penalty would "prevent or substantially impair the performance of [her] duties." Thus, her removal was constitutional.

The Court therefore denies McLain's twenty-third claim for relief.

XXIV. Twenty-Fourth Claim: Denial of Motion for New Trial

McLain's twenty-fourth claim for relief asserts that the trial court erroneously denied a motion for a new trial based on newly discovered evidence relating to the testimony of Lonnie Chatman, thereby rendering his conviction and death sentence unlawfully imposed in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

After the petitioner was convicted and sentenced to death he moved for a new trial pursuant to Penal Code s 1181(8) alleging the existence of new evidence. The new evidence consisted of the testimony of petitioner's former fellow inmate, Lonnie Chatman, who claimed to have drafted a document concerning Whitman for McLain prior to his trip to Ventura County.

During the guilt phase, McLain had testified that he went to Ventura County to obtain Whitman's signature on a "deposition" that stated that McLain had been "wrongly accused" of the acts against her. The "deposition" was not found among any of the items searched after McLain was arrested. No evidence was introduced during the guilt

phase to corroborate McLain's guilt phase testimony about the affidavit. Only when Chatman was interviewed for purposes of the penalty phase was it discovered that he had (allegedly) drafted the document and thus could corroborate McLain's story. Chatman testified to this fact during the penalty phase.

Petitioner asserts that Chatman could not have been discovered at any earlier time because McLain had forgotten who had drafted the document for him. Further, Chatman's testimony would not have been cumulative. Petitioner thus argues that Chatman's testimony would have undermined the prosecution's theory that McLain lied about his reasons for going to Ventura County to hide his vengeful motives. Petitioner argues that it undermines the evidence of his intent to kill, rape, or harm. Petitioner asserts that his trial counsel exercised reasonable diligence in attempting to discover the identity of the drafter of the "deposition."

The trial court, in denying the motion for a new trial, found that there was no reasonable likelihood of a result more favorable to the defendant having occurred had Chatman testified during the guilt phase. The trial court noted that despite Chatman's testimony at the penalty phase, the jury returned a verdict of death. It noted also that the story of the "deposition" was contradicted by the fact that no such paper was found in the search of McLain's belongings and his car.

The State argues that the trial court's denial of the motion does not present a federal question and that Petitioner has not raised a violation of his federal constitutional rights. The State further argues that the denial of the motion was premised on an implicit finding that Chatman's story was not worthy of belief by a jury and that this finding is entitled to a presumption of correctness. 28 U.S.C. § 2254(d)(8); Mata, 449 U.S. at 551, Tinsley v. Borg, 895 F.2d 520 (9th Cir. 1990), cert denied, 111 S. Ct. 974 (1991).

Petitioner rejoins that the failure to grant a new trial violated his right to due process and the Eighth Amendment's prohibition of cruel and unusual punishment.

Petitioner has presented no legal authority that the denial of a new trial in this situation is either fundamentally unfair or violates the Eighth Amendment. Cf. Hardnett, 25 F.3d at 879.

The application of California law to deny the new trial was not fundamentally unfair and did not result in an imposition of cruel and unusual punishment. The petitioner was convicted after a fundamentally fair trial. The trial court made the determination that the new evidence would not have affected the guilt-phase verdict. That determination was supported by the facts. McLain does not argue that the trial court failed to follow California law in a manner that violated his right to due process or that California's system for determining whether a new trial is proper is unconstitutional. The denial of the new trial, therefore, did not violate McLain's right to due process or result in the imposition of punishment barred by the Eighth Amendment.

Even though the denial of a motion for a new trial does not appear to fit the definition of "trial error," the Brecht standard for whether a violation of a constitutional right requires habeas relief be granted is informative. Hardnett, 25 F.3d at 879. The court must examine whether the error "'had substantial and injurious effect or influence in determining the jury's verdict.'" Brecht, 113 S. Ct. at 1722 (quoting Kotteakos, 328 U.S. at 776).

The jury was presented with Chatman's testimony during the penalty phase and defense counsel strenuously argued residual doubt as one of the bases for returning a non-death sentence. The jury nonetheless returned a verdict of death, indicating that Chatman's testimony did not create any residual doubt about McLain's guilt. If the jurors did not have any residual doubts, by definition they did not entertain any reasonable doubts even after having

heard Chatman's testimony. Thus, McLain's inability to present Chatman's testimony during the guilt phase did not have a substantial and injurious effect or influence on the jury's verdict. The Court therefore denies Petitioner's twenty-fourth claim for relief.

XXV. Twenty-Fifth Claim: Unconstitutionality of Death Penalty

In the context of California's nearly identical 1977 death penalty statute, the Ninth Circuit has plainly and directly rejected McLain's claim that the California statute is invalid for failing to require written findings by the jury: "While it might be preferable to have the [jury] provide a written statement concerning the basis for the decision to impose the death penalty, we cannot say that the California statute is unconstitutional because it requires only the judge to provide such a statement." Harris I, 692 F.2d at 1195-96. The Ninth Circuit explained that the trial judge's on-the-record explanation for denying the statutory motion to reduce the penalty "provides an adequate basis for appellate review." Harris I, 692 F.2d at 1196. McLain fails to suggest any meaningful distinction between the 1977 statute interpreted in Harris I and the 1978 statute under which McLain was sentenced.

The Ninth Circuit has also previously rejected McLain's complaint that the statute permits the jury to impose a sentence of death even when it has not been convinced, beyond a reasonable doubt, that death is the appropriate sentence. E.g. People v. Fudge, 7 Cal.4th 1075, 1127, 31 Cal. Rptr. 2d 321 (1994). The circuit observed that it was "not aware of any instances where the state must carry such a burden of proof when attempting to convince a sentencing authority of the appropriate criminal sentence." Harris I, 692 F.2d at 1195.

Again in Harris I, 692 F.2d at 1195, the Ninth Circuit directly rejected McLain's contentions that the statute is deficient in not requiring the jury to find, beyond a

reasonable doubt, that the aggravating factors outweigh the factors in mitigation. E.g. Fudge, 7 Cal.4th at 1127. After explaining the process by which a capital case arrives at the sentencing stage, the circuit noted that "a plurality of the California Supreme Court has read the statute as requiring the jury to weigh these factors before imposing the penalty.[8] [FN8]] These procedures guarantee that the jury's discretion will be guided and its consideration deliberate." Id., 692 F.2d at 1195.

In his petition, McLain complains that the statute does not require the jury to unanimously agree on which aggravating factors are present. E.g. People v. Miranda, 44 Cal.3d 57, 99, 241 Cal. Rptr. 594 (1988). The Attorney General contends that unanimity is unnecessary since there is no general right to a jury. While there is some degree of overlap, the policy considerations behind submitting decisions to a jury and the policy considerations in requiring jury unanimity are not coextensive. Compare Duncan v. Louisiana, 391 U.S. 145, 151-52, 155-56 (1968) with Johnson v. Louisiana, 406 U.S. 356 (1972), Apodaca v. Oregon, 406 U.S. 404 (1972), Burch v. Louisiana, 441 U.S. 130 (1979), and Brown v. Louisiana, 447 U.S. 323 (1980). The Supreme Court has clearly rejected the suggestion that the absence of a constitutional right to jury sentencing entitles the states to manipulate jury sentencing when they have chosen to proceed by way of a jury. Morgan v. Illinois, 112 S. Ct. 2222, 2228 (1992). The Attorney General's argument ignores that California entitles capital defendants to a sentencing jury and requires that the jury be unanimous. Nonetheless, McLain provides no argument or citation of authority as to why the jury should be forced to unanimously agree on which aggravating factors are present. The claim in the petition, unsupported by any argument, is rejected.

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8. This rule has now been adopted by a majority of the California Supreme Court. E.g. People v. Cudjo, 6 Cal.4th 585, 634, 25 Cal. Rptr. 2d 390 (1993).

Aware that the Ninth Circuit has clearly rebuffed his contentions that the two ultimate questions -- whether the aggravating factors outweigh the mitigating ones and whether death is appropriate -- must be established beyond a reasonable doubt, McLain argues that the underlying aggravating factors themselves must be proved beyond a reasonable doubt. Contrary to the Attorney General's argument, the absence of a right to a jury says nothing about the appropriate standard of proof. It would be entirely rational and not at all inconsistent for the Supreme Court to rule that, although a jury is not necessary, the sentencing authority in a capital trial -- whether judges or juries -- make the necessary findings beyond a reasonable doubt.

An appropriate analogy can be drawn from civil commitment proceedings where the Ninth Circuit ruled that there is no constitutional right to trial by jury, United States v. Sahhar, 917 F.2d 1197, 1206-07 (9th Cir. 1990), even though the Supreme Court has held that "due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence." Addington v. Texas, 441 U.S. 418, 427 (1979). Similarly, in typical civil litigation, there is no constitutional right to a jury for traditionally equitable matters, but that does not mean that the standard of proof could be reduced to no more than a scintilla of evidence.

McLain's stumbling block is that the Supreme Court has not imported the "beyond a reasonable doubt" standard into the area of capital sentencing. The Ninth Circuit has rejected the need to apply the "beyond a reasonable doubt" standard on the two ultimate questions. Harris I, 692 F.2d at 1195-96. McLain does not explain why the more rigorous standard is constitutionally necessary at an earlier stage of the sentencing process.

McLain's complaints about lack of proportionality review are similarly without merit. The concept of sentencing proportionality actually has several facets, all of which McLain appears to lump together.

The California Supreme Court in fact expressly addressed and rejected McLain's suggestion that death was disproportionate to his crimes. McLain, 46 Cal.3d at 121 n.7. This type of proportionality review appears to be constitutionally required. E.g. Coker v. Georgia, 433 U.S. 584, 590-91 (1977). The California Supreme Court undertook this type of analysis. McLain was convicted of an intentional murder committed during the course of a rape. McLain fails to explain why the death penalty is not a constitutionally permissible penalty for such a crime.

Second, the California Supreme Court regularly engages in intra-case proportionality review -- i.e., comparing the severity of defendant's sentence to the punishment imposed on other participants in the offense in light of the degree to which each participated in the criminal conduct -- and, in fact, conducted such a review in McLain's case. McLain, 46 Cal.3d at 121. See also Cox, 53 Cal.3d at 691.

As for "comparative," or inter-case, proportionality -- i.e., whether the penalty in this case is proportionate to the sentences imposed for similar crimes -- the United States Supreme Court has explicitly held that, "on its face," the California system is not "so lacking in other checks on arbitrariness that it [does] not pass muster without comparative proportionality review." Pulley v. Harris, 465 U.S. 37, 53, 51 (1984).

Other than complaining about proportionality review, McLain fails to explain why the appellate review provided in his case was not "meaningful." After the jury returned a death verdict, pursuant to California Penal Code § 190.4, the trial judge automatically considered the statutory motion to reduce the penalty. When the trial judge denied the statutory motion, the case was transferred to the California Supreme Court where the matter was reviewed on an automatic appeal. The state supreme court heard and decided the appeal, albeit against McLain. McLain, 46 Cal.3d 97. Notwithstanding that the state appellate courts' "obligations of meaningful

review" is considered to play a "crucial role ... in ensuring that the death penalty is not imposed arbitrarily or irrationally," Parker, 498 U.S. at 321, Barclay, 463 U.S. at 973-74 (Stevens, J., concurring), McLain fails to explain how any aspect of the multi- tiered review of his death sentence was anything other than meaningful.

In addition to the claims McLain raised in his petition, in supplemental briefing, McLain has identified various other alleged defects in California's death penalty statute. Nothing appears in the pleadings indicating that these aspects of the death penalty statute were being challenged. Since supplemental briefing was submitted contemporaneously, the Attorney General's supplemental brief was unable to anticipate these newly-raised claims and they were not addressed. Although the Attorney General might arguably be said to have had sufficient notice of the new challenges when filing its reply brief, it made no mention of the additional attacks on facial validity of the statute.

Reply papers are not the time for raising new arguments. McLain's post- exhaustion petition has been pending in this Court since August 1991. McLain has had ample time to raise these new claims prior to the Court's request, in August 1993, for supplemental briefing. The Attorney General was not placed on fair notice to defend against these additional claims in its simultaneously- filed opening brief. Consolidated Data Terminals v. Applied Digital Data Sys., 708 F.2d 385, 395 (9th Cir. 1983). Cf. Rule 2(c), Rules Governing Section 2254 Cases, Wacht v. Cardwell, 604 F.2d 1245, 1247 (9th Cir. 1979). Because this is a capital case, the Court has considered the merits of the additional claims. None of the alleged deficiencies appears to be of constitutional magnitude. Again, McLain utterly fails to provide any specific argument or explanation beyond bare allegations of unconstitutionality and unfairness.

The twenty-fifth claim for relief is denied.

XXVI. Twenty-Sixth Claim: Cumulative Error

The Court has reviewed the entirety of the state court trial transcripts and carefully reviewed all the claims raised in the petition. Only the fifteenth claim for relief -- the Skipper claim -- is sufficiently serious to warrant any type of relief. Few of the other claims actually involved any constitutional errors. To the extent the errors occurred, they were harmless. Even when accumulated, they remain harmless. The twenty-sixth claim for relief is denied.

XXVII. Twenty-Seventh Claim: Ineffective Assistance of Appellate Counsel

McLain argues that appellate counsel was ineffective in failing to raise additional issues that were unexhausted at the time the original petition was filed.

The right to an attorney means more than simply being accompanied in the courtroom by someone who happens to be a lawyer. Strickland, 466 U.S. 685. Where criminal defendants have an appeal as of right, the constitution entitles them to effective assistance of counsel in connection with that appeal. Evitts v. Lucey, 469 U.S. 387 (1985).

To establish a claim of ineffective assistance of counsel, the petitioner must do more than generally assert that counsel was deficient. He must point to the specific instances of deficient performance and establish that the errors were in fact prejudicial to his case. Cronic, 466 U.S. at 666.

McLain identifies only one alleged deficiency in appellate counsel's performance -- the failure to raise all possible issues on appeal. The right to an effective appellate lawyer, however, does not include the right to have that lawyer raise all non-frivolous issues that may be suggested by the record. Jones v. Barnes, 463 U.S. 745 (1983). McLain makes no allegation in his petition -- nor offer of proof through motion for evidentiary hearing or

otherwise -- that counsel did not exercise reasonable professional judgment in not raising other issues. Further, there is no allegation supporting an inference that the failure was in fact deficient performance.

Appellate counsel's only alleged deficiency was his failure to raise certain claims on appeal. Although the claims were unexhausted at the time the original petition was filed, the Court permitted McLain's habeas counsel to return to state court to present the additional claims. The state court denied those claims on the merits.

There also can be no showing of prejudice because there was no default in state court. All claims raised in the state habeas petition were considered by the state court on the merits. Any suggestion that the state court might have treated them differently if included in the appellate briefs is purely speculative. The absence of prejudice is reinforced by the fact that this Court has also reviewed all of the claims on the merits. McLain cannot properly claim prejudice from the failure to raise a claim that is without merit.

XXVIII. Twenty-Eighth Claim: Jury Misconduct

McLain's twenty-eighth claim for relief asserts that jury misconduct rendered his conviction and death sentence unlawful and unconstitutional in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

McLain alleges that the jury conducted unauthorized investigations including going to the beach where Ketcherside allegedly was left during the murder and where some of the victim's belongings were said to be buried, as well as going to K-Mart to determine the origin of a bandanna which was introduced into evidence. McLain further alleges that the jury consulted outside legal authority using dictionaries, law books, and other reference materials. McLain alleges that the jury improperly considered extrinsic evidence such as the fact that there had not been an execution in California for

some time, and that the sentence of life without possibility of parole could be commuted and lead to petitioner's release.

McLain moved to amend his petition for writ of habeas corpus to include his juror misconduct claim. In support of his motion, he submitted the declarations of three jurors: Jane Cormier, Frances Holt, and Terry Lombardi.

Cormier stated in her declaration that jurors engaged in their own investigation of facts including going to the beach which had been the scene of some activity in the case and comparing the serial numbers of bandannas available in stores. She stated that she had referred to law books to look up legal terms. Cormier also stated that the jury had discussed the fact that there had not been an execution in California for a long time and that they did not really believe McLain would be executed if they gave him a death sentence. She also stated that the jury was concerned that if McLain were released from prison he might seek revenge on them.

Holt stated in her declaration that she had referred to dictionaries and law books and had used the law library in the courthouse to look up legal terms.

Lombardi stated in her declaration that a juror had gone to a store and compared bandannas and reported the results to the rest of the jury. She also stated that the jurors discussed the fact that there had not been an execution in California for some time and discussed the likelihood that a sentence of "life without possibility of parole" would be overturned or commuted.

Shortly after the petitioner filed these declarations, Respondent filed declarations by Cormier, Holt, and Lombardi recanting their previous declarations and declaring that they had made no such statements to the investigators and were not aware of the contents of the declarations they had signed or their legal significance.

On December 6, 1993 the Court granted the petitioner's motion to amend. The Court ordered an

evidentiary hearing to resolve the issues of fact concerning juror misconduct.

The Court held three days of evidentiary hearings. On February 3, 1994, Cormier, Holt, Lombardi, and Lynne Estrada testified. On February 11, 1994 the two California Appellate Project investigators responsible for compiling the original declarations, Allison Oman and Maria McLaughlin, were called to testify but asserted their Fifth Amendment privileges against self- incrimination. The parties submitted the deposition testimony of Oman and McLaughlin in lieu of live testimony. Russell Stetler, Chief Investigator for the California Appellate Project, was called to testify, but expressed a desire to assert his Fifth Amendment rights and his attorney was not available. He was ordered to return on February 25, 1994. On February 25, 1994, the parties stipulated to the use of the deposition testimony of Russell Stetler. The parties also submitted the deposition testimony of Vickie Ward.

Cormier testified that she never went to the law library, she never looked up any legal term and she never heard another juror speaking of going to the law library and looking up any legal term. She further testified that she never owned law books and that she was not lent any law books while serving on the McLain jury. She never went to the beach nor heard of any other jurors going to the beach. She never compared bandannas at any store nor heard of any other juror comparing bandannas.

Holt testified that she never went to the law library while she was serving on the McLain jury to look up the words "aggravation," "mitigation," "conspiracy," or any other legal term. She never heard another juror say they had looked up such terms. She never went to a store to compare bandannas nor heard of another juror going to a store to compare bandannas. She never went to the beach nor heard of another juror going to the beach.

Lombardi testified that she never went to the law library to look up the words "aggravation," "mitigation," or any other legal term. She never heard another juror say

they had looked up a legal term. She never went to the beach nor heard another juror say they went to the beach. She never compared bandannas in a store nor heard another juror speak of going to a store for the purpose of comparing bandannas. She testified that she had heard a juror speak of seeing bandannas in a store but she thought this was after they had concluded deliberations. She testified that the other juror's examination of the bandannas had confirmed the conclusion they had already reached that the bandanna was prison issued (a conclusion favorable to McLain).

During the cross-examination of Cormier, Holt, and Lombardi, Petitioner impeached them with their prior declarations. However, they insisted that none of the conduct described in those declarations occurred and that they had never told the investigators that it had. They asserted that they did not know that the declarations included those statements and if they had known they would not have signed them. They made various allegations of improper conduct by Oman and McLaughlin.

The Court finds that McLain has failed to carry his burden of proving by a preponderance of the evidence that juror misconduct occurred. The original declarations are not admissible to prove the truth of the matters asserted. A prior inconsistent statement is admissible as non-hearsay substantive evidence if the declarant testifies at trial subject to cross-examination and the prior statement was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. F.R.Evid. 801(d)(1)(A). The declarations of the three jurors were not made under oath at a "trial, hearing, or other proceeding." Therefore, they are not admissible to prove that the truth of the matters asserted therein. See United States v. Amijo, 5 F.3d 1229, 1232 (9th Cir. 1993).

McLain attempted to prove that the three jurors actually did make the statements contained in their

declarations to the two investigators and that Respondent's attorneys and investigators persuaded them to change their story. Petitioner asserts that proof of this was thwarted by Respondent threat to criminally prosecute Oman and McLaughlin. However, even if the petitioner could prove that Cormier, Holt, and Lombardi made those statements to the investigators, Oman's and McLaughlin's statements would be hearsay and could not be used to prove that juror misconduct occurred.

Thus, Petitioner has presented no evidence that shows misconduct. He has, at most, thoroughly impeached these three witnesses so that none of their statements carry much credibility. This, however, does not prove that jury misconduct occurred.

Even if the jurors' alleged statements or original declarations were admitted as proof of the matters asserted therein, the Court would find no misconduct occurred. The overwhelming weight of the evidence supports the conclusion that there was no juror misconduct. This evidence against finding juror misconduct includes the in-court testimony of Cormier, Holt, and Lombardi and the declarations of the other nine jurors submitted by Respondent. (2nd Evid.Hrg. Exhs. 32, 83, 85, 91, 95, 98, 101, 103.)

The Court therefore denies Petitioner's twenty-eighth claim for relief.

CONCLUSION

McLain has demonstrated no prejudicial error affecting either the guilt conviction or the special circumstances rendering him eligible for the penalty of death. The petition for writ of habeas corpus as to his guilt and death eligibility is DENIED.

Upon careful consideration of the evidence and arguments presented during the penalty phase of the trial, the Court finds that McLain was deprived of a fair and reliable penalty verdict as a result of the trial court's ruling excluding any testimony relating to McLain's ability to conform to a prison environment. This evidence was highly relevant to the jury's penalty determination. Moreover, because of the substantial evidence and argument by the prosecutor suggesting that McLain might pose a safety risk even if incarcerated, McLain had a due process right to present this evidence to the jury. The Court finds no other error at the penalty phase trial that warrants relief from the penalty verdict. Based upon the error established under Claim XV, the petition for writ of habeas corpus as to sentence is GRANTED.

A writ of habeas corpus shall issue commanding the State of California to VACATE and SET ASIDE the sentence of death in the case of People v. Robert Cruz McLain, Case No. CR 15344 of the Superior Court for the County of Ventura, unless, within 90 days of the entry of judgment herein, the State of California grants McLain a new trial on all sentencing issues. If the State does not elect to retry McLain, the Superior Court shall VACATE his sentence of death and resentence him in accordance with applicable California law and the United States Constitution. 28 U.S.C. § 2241.

The Clerk of this Court shall immediately notify the Warden of the California State Prison at San Quentin of this Court's memorandum opinion and judgment.

IT IS SO ORDERED.

Dated: August 22, 1995

(SIGNED)

JOHN G. DAVIES
United States District Judge

Appendix C

F I L E D

MAR - 24 1998

Cathy A. Catterson, Clerk
U.S. Court of Appeals

Not For Publication

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT CRUZ MCLAIN,	)	
	)	
Petitioner,	)	No. 95-99020
	)	D.C. No. CV-89-03061
v.	)	JGD
	)	
ARTHUR CALDERON, et al.,	)	
	)	ORDER
Respondents,	)	
	)	

Before: FERGUSON, HALL and KOZINSKI, Circuit Judges.

The petition for rehearing is denied. The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote thereon. The suggestion for rehearing en banc is therefore rejected. Fed. R. App. P. 35(b).

Appendix D

F I L E D

APR - 2 1998

Cathy A. Catterson, Clerk
U.S. Court of Appeals

Not For Publication

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT CRUZ MCLAIN,	)	
	)	
Petitioner,	)	No. 95-99020
	)	D.C. No. CV-89-03061
v.	)	JGD
	)	
ARTHUR CALDERON, et al.,	)	
	)	ORDER
Respondents,	)	
	)	

Before: KOZINSKI, Circuit Judge.

The motion to stay the mandate is granted. The mandate shall issue on April 30, 1998.

Appendix E

F I L E D
May - 4 1998
Cathy A. Catterson, Clerk
U.S. Court of Appeals

Not For Publication

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT CRUZ MCLAIN,	)	
	)	
Petitioner,	)	No. 95-99020
	)	D.C. No. CV-89-03061
v.	)	JGD
	)	
ARTHUR CALDERON, et al.,	)	
	)	ORDER
Respondents,	)	
	)	

Before: KOZINSKI, Circuit Judge.

The motion to stay the mandate is granted. The mandate shall issue on June 1, 1998, unless the Warden files with the clerk of our court proof that a timely petition for certiorari has been filed. No further stays will be granted.